Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC. AND RAMONA BENNETT, *Petitioners*

—v.—

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

On Writ of Certiorari to the Supreme Court of the State of Washington

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Petition for Certiorari Filed September 22, 1976
Certiorari Granted November 29, 1976

Supreme Court of the United States

October Term, 1976

No. 76-423

Puyallup Tribe, Inc. and Ramona Bennett, *Petitioners*

—v.—

Department of Game of the State of Washington

On Writ of Certiorari to the Supreme Court of the State of Washington

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* The Memorandum Opinion, Findings of Fact and Conclusions of Law, Judgment and Order of the Trial Court, and the opinion of the Supreme Court of the State of Washington are contained in the Petition for Certiorari.

RELEVANT DOCKET ENTRIES

SUPERIOR COURT OF PIERCE COUNTY

No. 158069

DEPARTMENT OF GAME

v.

PUYALLUP TRIBE, INC.

Date	Proceedings.
1974	
Jan 3	—Pet. for Declaratory Relief
Jan 10	—Amended Petition for Declaratory Relief
Jan 11	—Letter Order Remand
Jan 14	—Set for Trial June 3, 1974
Apr 11	—Complt of Intervenor-Plt N.W. Steelheaders Motion for Intervention
May 1	—[Illegible] intervention
May 2	—Letter
May 3	—Mot. to Intervene Complaint of Western Steelheaders
May 22	—Motion & Aff. for Cont.
May 23	—Order
May 31	—Deft. First Set of Interog. to Dept Game Deft. Interog to Pet. Steelheaders
Jul 24	—Memo of law in response to J Brown letter
Sep 20	—Letter
Oct 9	—[Illegible] response to Cts letter for Clarification

Date	Proceedings.
Dec 23	Memo. J 333 P 472 Trial Record
	Statement of Fact 1, 2, 3
	Memorandum Decision
Dec 30	Letter & copies
	Letter & copies
	Letter & copies
	Motion for reconsideration
Jun 3*	Subpoena Duces Tecum (2)
Jun 10*	Order Granting Leave to Intervene
1975	
Apr 9	Findings of Fact & concl.
	Judgment & order
Apr 10	Letter
Apr 28	Notice of Appeal
May 6	Notice of Cross Appeal
1976	
Feb 3	Temp Rest Order—etc 594-1-428
Feb 6	Closure Order
	Memo. J 333 P 605
Feb 27	Jdgmt for Contempt
Dec 14**	Temp Rest Order
Dec 22**	Closure Order

* Indicates material out of order in original.
** Occurring after grant of certiorari.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME of the STATE OF WASHINGTON,
Plaintiff,

vs.

PUYALLUP TRIBE, INC., ET AL., *Defendants*.

Amended Petition for Declaratory Relief Pursuant to Remand

COMES now the plaintiff State of Washington Department of Game by and through its Attorney General Slade Gorton and Assistant Attorneys General Joseph Lawrence Coniff, Jr., and James M. Johnson, and for a claim against defendants state:

I.

On November 19, 1973, the Supreme Court of the United States entered its opinion in *Department of Game of Washington vs. Puyallup Tribe, Inc., Et al.* (copy of which is annexed hereto and marked as Exhibit "A"). On December 18, 1973, the Clerk of the Supreme Court of the United States caused to be issued a Mandate to the Supreme Court of Washington (copy of which is annexed hereto and marked as Exhibit "B'). On December 27, 1973, the Honorable Frank Hale, Chief Justice of the Supreme Court of the State of Washington entered an Order of Remand in Pierce County Cause No. 158069 (copy of which is annexed hereto and marked as Exhibit "C").

II.

The opinion of the United States Supreme Court (Exhibit "A") reversed the judgment of the Supreme Court

of the State of Washington "insofar as it treats the steelhead problem" and "remand(ed) the case for proceedings not inconsistent with this opinion." The Mandate from the Clerk of the United States Supreme Court (Exhibit "B") requires that the Courts of the State of Washington conduct proceedings in this cause in conformity with the opinion of the United States Supreme Court. The Mandate has been implemented by the Order of Remand of Chief Justice Hale (Exhibit "C") which requires this Court to "hold further proceedings consistent with the opinion and mandate of the Supreme Court of the United States."

III.

On November 29, 1973, the Game Commission of the State of Washington in response to these opinions and orders promulgated, pursuant to the opinion of the Supreme Court of the United States, certain rules and regulations pertaining to the taking of steelhead by members of the Puyallup Tribe of Indians on the Puyallup River, which regulations were to be effective December 1, 1973, to January 17, 1974. Copies of said rules and regulations are attached hereto and marked as Exhibit "D."

On January 7, 1974, the Game Commission again considered the treaty Indian gill net fishing seasons set at their November 29, 1973, meeting, but the Commission agreed with the recommendations of staff of the Department of Game that those regulations should not be extended past their set closing date, i.e., January 17, 1974. The Commission, however, did establish a treaty Indian gill net fishing season for steelhead on the Skagit River, which season is to be effective January 13, 1974, to February 13, 1974. A copy of this season is attached hereto and marked Exhibit "E".

Defendant Puyallup Indians have disregarded and violated rules and regulations by unrestricted commercial net

fishing for steelhead trout in the Puyallup River since rendition of the United States Supreme Court's opinion issued on November 19, 1973. Plaintiff Department of Game has no adequate remedy at law and the public interest in the valuable steelhead resource of the Puyallup River will suffer permanent and irreparable injury from the actions of the defendants as set forth above unless a judgment is entered confirming the right of the Washington Department of Game to promulgate and enforce reasonable rules and regulations pertaining to the Puyallup Indian net fisheries on Commencement Bay, the Puyallup River and its tributaries.

IV.

Defendants Puyallup Tribe, Inc., Et al., have been and threaten to continue to engage in unregulated commercial net fishing in the Puyallup River for steelhead trout. Such unrestricted netting activities are inconsistent with the opinion of the Supreme Court of the United States issued November 19, 1973 (Exhibit "A").

V.

An emergency presently exists requiring that this cause be set down for hearing at the earliest practicable date because serious damage is presently occurring to the steelhead runs of the Puyallup River and there is a likelihood of violence and civil disorder resulting from the present confusion as to the respective legal rights and responsibilities of the plaintiff and defendants in this cause.

WHEREFORE Washington Department of Game prays that this Court declare that Game possesses the sole and exclusive authority to promulgate and enforce reasonable rules and regulations for the taking of steelhead trout by members of the Puyallup Tribe of Indians in Commencement Bay, the Puyallup River and its tributaries.

FURTHER, that this Court set this proceeding down for hearing at the earliest practicable date at which time trial should be had on the merits concerning the issues remaining in this proceeding.

FURTHER, that the plaintiff Washington Department of Game have judgment against all defendants in accordance with the allegations of this petition and for such other and further relief as to the Court may seem just and reasonable.

DATED this 9th day of January, 1974.

Respectfully submitted:

SLADE GORTON
Attorney General

/s/ JOSEPH LAWRENCE CONIFF, JR.
Joseph Lawrence Coniff, Jr.
Assistant Attorney General

/s/ JAMES M. JOHNSON
James M. Johnson
Assistant Attorney General

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Plaintiff,

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS, *Intervenor-Plaintiffs*,

v.

PUYALLUP TRIBE, INC., et al, *Defendants*.

Complaint of Intervenor-Plaintiffs Northwest Steelheaders Council of Trout Unlimited and Gary Ellis

Intervenor-Plaintiffs allege:

I

Trout Unlimited is a nationwide nonprofit corporation incorporated in Michigan and authorized to do business in the State of Washington with over 18,000 members throughout the United States and has as one of its primary purposes, the conservation of fish.

II

Northwest Steelheaders Council of Trout Unlimited is the regional council of Trout Unlimited in the Pacific Northwest and has over 5,000 members in the Pacific Northwest, including about 3,000 members in the State of Washington of whom about 500 live in Pierce County, Washington. Chapters are located in Tacoma and Puyallup in Pierce County and other chapters are located in Bellevue, Bremerton, Seattle, Everett, Aberdeen, Spokane, Chehalis, Hazel Dell, Longview Kelso, Sunnyside, North Seattle, Bothell, Olympia, Port Angeles, Mt. Vernon, Lynn-

wood, Federal Way, Renton, Wenatchee, Vancouver, Camas-Washougal and Yakima.

III

Most of the members of the Tacoma and Puyallup chapters are licensed sports fishermen in the State of Washington, have paid $2.00 each for punch cards entitling them to fish for steelhead trout in the State of Washington, and do regularly fish for steelhead trout in Commencement Bay and the Puyallup River and its tributaries (all referred to herein as the Puyallup River system in Pierce County, Washington.)

IV

Steelhead trout is a game fish under the laws of the State of Washington.

V

Gary Ellis is a citizen of the State of Washington, a resident of the City of Tacoma in Pierce County, Washington, over the age of 21 years, and the Washington State president of the Northwest Steelheaders Council of Trout Unlimited. He is a steelhead fisherman, holds a valid current license from the State of Washington permitting him to engage in this activity, and customarily fishes for steelhead trout in the Puyallup River system.

VI

Approximately 12,000 to 14,000 steelhead trout are caught by licensed sports fishermen in the Puyallup River system each year and a significant number are caught by members of the Northwest Steelheaders Council of Trout Unlimited, especially members of the Tacoma and Puyallup chapters. Sports fishermen retain steelhead trout that they catch for their own use. If the steelhead trout caught by sports fishermen on the Puyallup River system each year were sold, the value of this fish would be about $130,000.

VII

Most of the steelhead trout in the Puyallup River system come from hatcheries. Most of the cost of the hatcheries program is financed by the license fees of sports fishermen, including the license fees of members of Northwest Steelheaders Council of Trout Unlimited.

VIII

The decision of the United States Supreme Court in this case entered November 19, 1973, provides that members of Puyallup Tribe, Inc. have a right to fish commercially for steelhead trout in the Puyallup River system and the Supreme Court directs that the matter be remanded to this court to apportion the steelhead trout in the Puyallup River system between Puyallup Tribe, Inc. and the sports fishermen, to find whether the Indian treaty fishing right extends to the hatchery fish paid for by the sportsmen, and to determine a reasonable program of regulation by the Department of Game of the State of Washington consistent with the decision.

IX

Reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system by the Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is necessary for the conservation of the resource.

X

Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries because the hatchery program is funded by sportsmen's license fees and excise taxes paid by sportsmen on fishing equipment.

XI

Puyallup Tribe, Inc. and its members are entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this Court should deem just and equitable.

WHEREFORE, Intervenor-Plaintiffs pray for a decree of this court providing as follows:

1. The Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is directed to establish reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system.

2. Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries.

3. Puyallup Tribe, Inc. is entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this Court should deem just and equitable.

4. Such other relief as this court should deem just and equitable.

RIDDELL, WILLIAMS, VOORHEES, IVIE & BULLITT

By _____
VINCENT R. LARSON

WILLNER, BENNETT, MEYERS, RIGGS & SKABSTAD

By _____
DON S. WILLNER
Attorneys for Intervenor-Plaintiffs Northwest Steelheaders Council of Trout Unlimited and Gary Ellis

(April, 1974)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME of the STATE OF WASHINGTON, et al,
Plaintiffs,

vs.

PUYALLUP TRIBE, INC., et al, *Defendants.*

Answer

COMES NOW the defendant Puyallup Indian Tribe, and for answer to the amended petition of the Department of Game, admits, denies and alleges as follows:

I

The defendant admits paragraph I of the amended petition.

II

The defendant admits paragraph II of the amended petition.

III

Answering paragraph III of the amended petition, the defendant admits subparagraphs one and two thereof. The defendant denies each and every other allegation in paragraph III.

IV

The defendant denies paragraph IV of the amended petition.

V

The defendant denies paragraph V of the amended petition.

By way of answer to the complaint of the intervening plaintiffs Northwest Steelheaders Council, the defendant Puyallup Indian Tribe admits, denies and alleges as follows:

I

Defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph I of the complaint and therefore denies the same.

II

Defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph II of the complaint and therefore denies the same.

III

The defendant is without knowledge or information sufficient to form a belief as to the licensing status and fishing habits of the intervening plaintiffs' Tacoma and Puyallup members, and therefore denies the same. The allegation that the intervening paintiffs' members are entitled to fish for steelhead is a conclusion of law requiring no answer.

IV

The defendant admits paragraph IV of the complaint insofar as stated, but adds that the laws of the State of Washington are governed by applicable judicial decisions and federal constitutional and treaty provisions.

V

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph V of the complaint and therefore denies the same.

VI

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph VI of the complaint and therefore denies the same.

VII

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph VII of the complaint and therefore denies the same; and alleges that the presence of the steelhead trout in the Puyallup River system antedates the State Hatcheries Program and the Northwest Steelheaders Council.

VIII

As an attempt to paraphrase the November 19, 1973, decision of the Supreme Court of the United States, paragraph VIII of the complaint consists of conclusions of law which require no answer. However, said paraphrase is incorrect and defendants deny such allegations.

IX

The defendant denies paragraph IX of the complaint.

X

The defendant denies paragraph X of the complaint.

XI

Paragraph XI of the complaint is a prayer for relief which requires no answer.

By way of answer to the complaint of the intervening plaintiffs Western Steelheaders, Inc., the defendant Puyallup Indian Tribe admits, denies and alleges as follows:

FIRST ALLEGED CAUSE OF ACTION

I

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph I of the complaint and therefore denies the same.

II

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph II of the complaint and therefore denies the same.

III

The defendant is without knowledge or information sufficient to form a belief as to the veracity of paragraph III of the complaint and therefore denies the same.

IV

As an attempt to paraphrase the November 19, 1973 decision of the Supreme Court of the United States, paragraph IV of the complaint consists of conclusions of law requiring no answer. However, said paraphrase is incorrect and defendants deny such allegations.

V

The defendant denies paragraph V of the complaint.

SECOND AND THIRD ALLEGED CAUSES OF ACTION

VI

The second and third claims of the intervenor Western Steelheaders, Inc. are directed to the State of Washington, Department of Game and require no response from this defendant beyond the existence of this defendant's rights reserved in the Treaty of Medicine Creek.

By way of further answer and defense to the amended petition of the State of Washington, Department of Game and the complaint of the intervening plaintiffs, the defendant Puyallup Indian Tribe alleges as follows:

AFFIRMATIVE DEFENSE I

On April 30, 1974, there was entered in the United States Court of Appeals for the Ninth Circuit a decision in *United States* v. *State of Washington,* No. 73-1793, a copy of which is attached hereto as defendant's Exhibit 1. This decision affirms the sole and exclusive right of the Puyallup Indian Tribe, under the Treaty of Medicine Creek, to take fish, including steelhead, from within the exterior boundaries of the Puyallup Indian Reservation. This decision is binding and controlling on plaintiff and the intervening plaintiffs and renders moot their claims for relief seeking to adjudicate defendant's rights to steelhead trout in the Puyallup River System taken from on-reservation sites.

AFFIRMATIVE DEFENSE II

On February 12, 1974, there was entered in the United States District Court for the Western District of Washington, a decision in the case of *United States of America, et al.* v. *State of Washington, et al.,* No. 9213, a copy of which is attached hereto as defendant's Exhibit 2. This decision affirms the right of the Puyallup Indian Tribe, under the Treaty of Medicine Creek, to share in the taking of 50% of the harvestable steelhead from the affected waters, exclusive of Puyallup tribal needs and on-reservation fishing. The decision determined that the usual and accustomed fishing places of the Puyallup Indian Tribe at the time of the Medicine Creek Treaty included the marine areas around Vashon Island and adjacent portions of Puget Sound, Commencement Bay, the Puyallup River and its tributaries, as well as other creeks adjacent to, but not

tributaries of the Puyallup River. The decision in *United States of America, et al.* v. *State of Washington*, and other federal law and regulations, including 25 C.F.R., Part 256, effectively preempt the power of state agencies to regulate the defendant's treaty fishing rights.

Affirmative Defense III

The precise share of harvestable steelhead which this defendant is entitled to take at its usual and accustomed fishing grounds and stations during a particular run or season cannot be determined without reference to similar rights possessed by other Indian tribes identified in defendant's Exhibit 2. This question is part of the litigation continuing in the United States District Court for the Western District of Washington. The range of off-reservation treaty fishing rights mentioned in the immediately preceding paragraph was not before the Supreme Court of the United States under the most recent petition for certiorari in the instant case. Other tribes would be indispensable parties to litigation seeking to decree the precise share of harvestable steelhead to which this defendant is entitled.

Affirmative Defense IV

For the reasons stated under Affirmative Defenses II and III above, and for additional reasons of economy of time and effort and the need for a definitive resolution in a single forum, the court in this case, as a matter of comity, should defer to the continuing federal litigation.

Affirmative Defense V

Within the limitations of the continuing federal litigation, and without reference to its on-reservation fishing rights, the Puyallup Indian Tribe has the right to take up to 50% of the harvestable steelhead from its usual and

accustomed fishing grounds and stations. Evidence adduced in this Court on prior hearings and, therefore, the law of this case, reflects that the Puyallup steelhead hatchery program operates to mitigate the loss of run-size of native steelhead from adverse environmental factors. There is no legal distinction to be drawn between the defendant's rights to the natural steelhead run and the run produced in Washington State hatcheries.

Affirmative Defense VI

The steelhead run on the Puyallup River has been adversely affected by a number of adverse environmental factors, including water pollution, damming, and other interference with waterways. Plaintiff and other agencies of state government have failed to take effective action to prevent the depletion of the Puyallup steelhead run by these adverse environmental factors. It is therefore inequitable and discriminatory for plaintiff to seek equitable relief against the defendant whose rights have been adversely affected by plaintiff's own action.

Additional Defense

The amended petition and the complaints of the intervening plaintiffs fail to state a claim upon which relief can be granted against the defendant.

WHEREFORE, this defendant prays that the Court:

1. Deny the relief sought by the plaintiff in its amended petition;

2. Deny the relief sought by the intervening plaintiffs in their amended complaint; and

3. Declare the defendant's right to take up to 50% of the harvestable steelhead from its usual and accustomed fishing grounds and stations.

Dated this *21st* day of *March*, 1974.

STAN PITKIN
UNITED STATES ATTORNEY

/s/ THOMAS P. GIERE
Thomas P. Giere
ASSISTANT U.S. ATTORNEY

/s/ WILLIAM H. RODGERS, JR.
William H. Rodgers, Jr.
Attorney for the Puyallup Tribe

JOHN H. SENHAUSER
Attorney for Ramona Bennett

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Plaintiff,

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS, *Intervenor-Plaintiffs*,

WESTERN STEELHEADERS, INC., *Intervenor-Plaintiffs*,

vs.

PUYALLUP TRIBE, INC., et al, *Defendants*.

Statement of Facts

BE IT REMEMBERED, that the above-entitled and numbered cause came on for hearing Monday, June 3, 1974, before the HONORABLE WILLIAM L. BROWN, JUNIOR, at the County-City Building, Tacoma, Washington; the parties being represented by their respective counsel as follows:

SLADE GORTON, Attorney General, by EDWARD B. MACKIE, Deputy Attorney General, Temple of Justice, Office of the Attorney General, Olympia, Washington 98501, appearing on behalf of the Department of Game of the State of Washington, Plaintiff.

DON S. WILNER, 900 Corbett Building, Portland, Oregon 97204, appearing on behalf of Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, Intervenor-Plaintiffs.

JAMES TANNESEN, of the firm of DAVIES & ROETCISOENDER, 3316 N. E. 125th Street, Seattle, Wash-

ington 98125, appearing on behalf of Western Steelheaders, Inc., Intervenor-Plaintiffs.

VINCENT R. LARSON, of the firm of RIDDELL, WILLIAMS, VOORHEES, IVIE & BULLITT, 4310 Seattle-First National Bank Building, Seattle, Washington 98154, appearing on behalf of Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, Intervenor-Plaintiffs.

WILLIAM H. RODGERS, JUNIOR, Attorney-at-Law, 600 New Jersey Avenue, N.W., Washington, D.C. 2000, appearing on behalf of the Puyallup Tribe, Inc., et al, Defendants.

STAN PITKIN, United States Attorney, by THOMAS P. GIERE, Assistant United States Attorney, 1012 United States Courthouse, Seattle, Washington 98104, appearing on behalf of the Puyallup Tribe, Inc., et al, Defendants.

JOHN H. SENNHAUSER, Attorney-at-Law, 104½ Cherry Street, Seattle, Washington 98104, appearing on behalf of Ramona Bennett, Defendant.

GEORGE D. DYSART, Assistant Regional Solicitor, United States Department of the Interior, 1002 N. E. Holladay Street, P. O. Box 3621, Portland, Oregon 97208, appearing on behalf of the Puyallup Tribe, et al, Defendants.

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[20] MR. MACKIE: Excuse me. Your Honor, we take the position first, that we have to operate on the premise that there is a reservation unless the United States Supreme Court grants certiorari on that decision and reverses the same. And that that question can only be resolved by that format. And the failure to take certiorari or taking so failure to overturn the 9th Circuit the reservation is there and we must observe it. But what we are asking is, first, by this court to determine that there is a distinction in terms of the treat right between the natively propagated steelhead and those which are hatchery planted. Now, that concept, since we only have jurisdiction off-reservation—is only material to the off-reservation fishery. Our second issue that we want resolved is really more strictly a legal rather than a factual. It is simply a determination that the State in establishing the regulatory pattern for off-reservation [21] Indian Treaty fishing on the Puyallup can take cognizance of the catch which is made on the reservation area. Now, if the Supreme Court were to take certiorari and decide there is no reservation the second issue then would not be material. But we can't operate on that premise at this time so we need that resolved. And those two questions being resolved we then can contact the Tribe to determine the magnitude and the intensity of the fishing effort they intend to engage in on the reservation, and then second, if they intend to fish off-reservation, and if so, what is the nature of their intention, and taking then the resolution of the first two issues plus that the Department of Game can then establish regulatory patterns for the off-reservation fishing activity which would encompass the activity by the Puyallups.

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BY MR. WILLNER

[35] First of all, Your Honor, my clients were not parties to the decision before Judge Boldt. My clients, Northwest Steelheaders, were in that case—we filed an amicus brief and we were not parties. As a matter of fact, we have sought to get into that case and Judge Boldt has denied our right to get into that case and we certainly do not feel bound by a case that we tried to get into and he won't let us.

I would respectfully submit, however, that in connection with this issue that a fair reading of Justice Douglas' opinion, and it's a short opinion in Puyallup II, essentially

says that the Department of Game has the duty of regulating the fishery on the Puyallup River, both the Treaty Indian fishery of the Tribe and also the sports fishery, and the Department must [36] make certain decisions. It says the Department shall decide what formula, and the Court says what formula should be employed is not for us to propose; there are many variables: The number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses issuable, the limits of the catch of each sports fisherman, duration of the season for sports fishermen and the like. The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. I read that as an instruction by Judge Boldt that once this Court——

THE COURT: You said "Boldt."

MR. WILNER: By Justice Douglas, I'm sorry. I read that as instruction by Justice Douglas that once this Court has defined the open issues that the Department of Game then must do this. The reason why we would respectfully suggest that Judge Boldt's opinion though it may be a precedent that Your Honor might want to consider is by no means binding on this Court and we would suggest in this area it should be differed with because Judge Boldt says in his opinion that the Department of Game of the State of Washington does not have a right to regulate the Indian Treaty fishery once the Indian tribes qualify in ways that Judge Boldt prescribes. So, in our judgment we have a square conflict between the opinion of Justice [37] Douglas and the Supreme Court of the United States on the one hand and Judge Boldt on the other hand. The Supreme Court of the United States says the Department has a duty to regulate—the Department of Game, and Judge Boldt says the Department does not.

TESTIMONY OF CLIFFORD J. MILLENBACH, CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Direct Examination By Mr. Mackie

• • • • • • • • • • •

[104] Q. Now, the steelhead smolts which you raise in the hatchery, when do you normally plant these in the watershed? A. They are normally planted to mesh with the natural [105] cycle of the fish which is from about April 15th to May 15th. We reason that if this was the normal period for steelhead to migrate to salt water that a hatchery program, based on the natural behavior pattern of a steelhead, would have the highest chance for success. We know, too, the planting of smolts at the time they are moving to salt water, that they spend a very short time in the stream system, basically using it only as a highway to the ocean. Because of this, then, in our view there is no impact as far as the other salmonoid or other steelhead or natural steelhead that may be in the stream.

Q. How long are the smolts kept in the hatchery? A. Our program is designed to produce a smolt within one year. In the early work, particularly with summer steelhead, we were unable to do this and we retained some groups of fish for two years to make sure that they had attained smolt size in time for the spring migration to the ocean.

Q. How do the hatchery one-year smolts compare with the two-year smolts of the native fish? A. There seems to be generally just a little larger size to the hatchery fish as compared to the wild smolts. We find, of course, some variance in the wild smolts too. Those that would stay in fresh water for three years, for example—a small percentage of the population—could average nine or ten inches in length. But the normal for the two-year residency in fresh [106] water on the part of the wild or native fish is to be about six to eight inches in length. Our hatchery fish on the average are closer to eight inches, so generally are just slightly larger than the wild smolts.

Q. How does the life cycle of the hatchery fish compare with the life cycle——

THE COURT: Excuse me. How do you account for that?

THE WITNESS: Because in the hatchery of course the fish is subjected to artificial feeding and in many of our hatcheries we have advantageous water temperatures. The Game Department has utilized springs for many of its hatcheries which is a higher temperature regime throughout the year and the temperature is a very important controlling factor in growth rates. The streams which drop in temperature in the wintertime, the growth also is reduced in the wintertime. It is because primarily of the suitable water temperatures we have in the hatcheries and the improved diets, artificial feeding, that we are able to produce a smolt in one year as compared to two years for a native fish in the wild.

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[109] Q. What's the approximate percentage for the return of the hatchery smolts that were planted which in turn return as adults? A. We have determined this through numerous experiments and have had results all the way from zero to fifteen percent. However, the common return rate is at about the ten percent level.

Q. When the hatchery stock return as adults to the watershed do they return to the hatchery? A. One of the key factors in our steelhead program is that steelhead will return to the stream in which they are planted. In other words, if we were to hatch the steelhead and rear them at the Puyallup Hatchery but were to plant the smolts in the Green River, the smolts, the adults from that plant would return to the Green River and not to the Puyallup River. This is one of the real important factors of our steelhead programs in that the homey instinct seems to relate to the area in which the smolt occurs when it starts its migration to sea.

Q. When the hatchery adult steelhead return to the watershed do they spawn in like manner to those of the native run? A. They react essentially the same as a wild steelhead, however, we do note that there is some difference in timing.

• • • • • • • • • •

[113] Q. If I understand your testimony correctly, are you saying—do we take any steelhead eggs from the Puyallup River for purposes of the hatcheries? A. No, we do not.

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[127] Q. Mr. Millenbach, is the White River that you are describing, is that historically part of the Puyallup River system? A. The records indicate that the White River in 1906 and prior to that time, or prior to 1906, flowed into the Green River rather than into the Puyallup; and that as a result of floods—high runoff—it broke a channel into the Puyallup River system and efforts subsequent to that in terms of diking and so forth have retained the White River into the Puyallup River system which was contrary to its original water course.

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[130] Q. How many hatcheries does the Department of Game currently operate which are involved in the propagation of steelhead? A. We operate about 18 hatcheries that are used either wholly or in part for steelhead production.

Q. Do you also operate some rearing ponds in conjunction with the steelhead program? A. Yes, there are nine rearing ponds used for steelhead production.

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[137] Q. Mr. Millenbach, the funds which are received from, for example, P.U.D.'s, the fifteen million plus, are those specified for specific areas and specific hatcheries?

A. Yes, they relate to specific projects and to specific plantings and hatchery areas.

Q. Do any of those funds relate in any way to the Puyallup watershed? A. No.

Q. The last figure, the nine million five hundred eighty-six thousand which you referred to, the Federal funding on the Columbia River—— A. Yes.

Q. —are all of those expenditures earmarked for the Columbia River? A. And tributary to the Columbia River.

Q. Were any of those funds available or in any way used for the Puyallup watershed? A. No.

Q. You referred to the fifty percent funds from the Federal Anadromous Fish Act, I believe total investment being seven hundred eighty thousand dollars. I assume that means three hundred ninety thousand from Federal funds and three hundred ninety from [138] state? A. Yes. Remember the figures I quoted are actual replacement value and they represent that. If it's an Anadromous Fish Act facility it would represent a fifty percent Federal value and a fifty percent state value.

Q. Now, in terms of those funds are they earmarked for specific projects? A. Those funds, yes, do relate to specific projects.

Q. Do any of those funds relate to the operation of the Puyallup watershed or planting program? A. No.

Q. You referred to a figure of four hundred fifty-seven thousand dollars on Dingell-Johnson money; were any of those funds used in conjunction with the Puyallup watershed program? A. No.

Q. With the operation of the State hatcheries what's the annual capacity for the production of steelhead smolt by your current program? A. We're currently producing about 5,000,000 smolts a year.

Q. Now, the smolts that you produce——

THE COURT: So there is no misunderstanding about it, these are—I say—artificially supported fish; these are

the fish you get the eggs from a steelhead that comes up a river and then you raise them in your own facility and then you release 5,000,000 smolt into the various rivers of this State, [139] is that correct?

THE WITNESS: That's correct, Your Honor.

BY MR. MACKIE:

Q. Do all of the eggs for this entire hatchery program come from the Chambers Creek complex? A. No. The Chambers Creek complex is the prime source of our winter steelhead program. However, we also take eggs at the Cowlitz Hatchery to sustain that program and our summer run steelhead program has a basis in a hatchery on the Washugal River which is one of the Columbia River facilities. Our summer steelhead program is basically initiated from that hatchery.

Q. I believe you testified that all of the hatchery fish which are planted in the Puyallup River originate from the Chambers Creek complex. A. Yes. The procedure is to obtain the eggs from Chambers Creek and handle them at the South Tacoma Hatchery——

THE COURT: Excuse me. Where is this South Tacoma Hatchery located?

THE WITNESS: It is near Lake Steilacoom and just southwest of the town of Tacoma, or city.

THE COURT: Actually it's on Steilacoom Road, isn't it?

THE WITNESS: Yes, it is.

BY MR. MACKIE:

Q. Mr. Millenbach, on Chambers Creek there are actually two separate hatchery complexes, are there not? [140] A. Yes, there are. The South Tacoma Hatchery which was built many, many years ago by state funds and is operated

by state funds and a new facility constructed about a quarter of a mile upstream from the South Tacoma Hatchery, again on Chambers Creek, and there was construction utilizing some spring water that was formerly a private trout hatchery. This Chambers Creek Hatchery was constructed with Anadromous Fish Act funds and is operated by those funds.

Q. The Chambers Creek Hatchery is the newer of the two? A. Yes.

Q. Does the Chambers Creek Hatchery, the newer of the two, participate in any way in the hatchery planting program for the Puyallup watershed? A. It has not at this time. The Chambers Creek Hatchery is used to expand the program that was limited in our old South Tacoma Hatchery, and the eggs are incubated at the Chambers Creek Hatchery from the spawning operation at South Tacoma Hatchery, the small fish are reared to spawning size at the new Chambers Creek Hatchery and then transferred out to many of the rearing ponds that are operated under the Anadromous Fish Act. So the two programs are really quite distinct.

Q. When you operate on the South Tacoma Hatchery—this is where you originally take the eggs? A. Yes.

[141] Q. —how long are the eggs retained there before they or the fry resulting from the eggs are transferred to the Puyallup Hatchery? A. The program has varied through the years and we have transferred some eggs directly to the Puyallup Hatchery and in other years we have hatched the eggs when we had sufficient space at the South Tacoma Hatchery and transferred them as small fingerling to the Puyallup Hatchery for continuing rearing.

Q. You simply truck these fish or eggs from—— A. Yes.

Q. —from there to the Puyallup Hatchery? A. Yes.

Q. When you raise the smolts at the Puyallup Hatchery what is the size of fish before you plant them in the river? A. They are about six to the pound on the average and about eight inches in length as an average.

Q. I believe you testified you normally plant these smolts in May of each year? A. Usually between the 15th of April and the 15th of May, because this is the peak of the normal downstream migration of native or wild steelhead smolts.

Q. What is the normal time period that these planted smolts from the hatchery would remain in the fresh water system before reaching the salt water of Puget Sound? A. Most of them are fully smolted by the time we plant them and they move very rapidly to the marine area. [142] For example, we noted one year on the Skagit River we started releasing fish in the middle of April and a week later some of those young fish were observed at the mouth of the Skagit River which is a distance of 50 miles. They move essentially immediately toward salt water.

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[143] Q. Would you tell us what total you have computed for the expenditures by the Department of Game on the steelhead program? A. Yes, I arrived at a figure of one million six hundred thirty-six thousand two hundred forty-seven dollars ($1,636,247) for the expenditures by the Department on the steelhead program statewide for the 1972-73 fiscal year.

Q. Could you give us a breakdown of the figures which result in that total, or major headings? A. Yes. The hatchery expenditures amounted to eight hundred seventy-five thousand nine hundred and seven dollars ($875,907); the fishery management, and let me explain that we have field biologists who are obtaining creel census data in the field and they handle all the management responsibilities relating to steelhead, and I estimated that a portion of their time relating to the steelhead program would amount to an expenditure of two hundred twenty-five thousand dollars ($225,000) a year.

I have another additional breakdown. We have under our Environmental Management activities which relate to the

acquisition of stream bank access, boat launching areas and lands for recreational use [144] and also involved in Environmental Management is some work with mitigation programs, and I estimated expenditures by that Division to total fifty thousand dollars ($50,000).

The final figure I have relates to what we call the Wildlife Management Division which are our enforcement personnel. They spend a great deal of time checking the steelhead fishery and exercising their authorities in relation to the watershed, and I estimated a portion of their total expenditure relating to the steelhead program was four hundred eighty-five thousand three hundred and forty dollars ($485,340).

Q. Mr. Millenbach, have you also examined the source of revenues to match up for the revenue sources as to this total of one million six hundred thirty-six thousand two hundred forty-seven dollars ($1,636,247) of expenditure? A. Yes, I have.

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Q. Mr. Millenbach, just prior to lunch you explained that the operational expenses of the steelhead program [145] were one million six hundred thirty-six thousand two hundred forty-seven dollars ($1,636,247) for the '72-'73 fiscal year. A. Yes.

Q. I ask now if you would break down the source of revenues for those expenditures during the lunch break and you have written numbers on the blackboard. Would you explain those figures. A. I would like to emphasize, these are the expenditure records for the statewide program. From the license fees of the Game Fund there was one million ninety-three thousand six hundred and eighty dollars ($1,093,680) expended. From the Federal Anadromous Fish Act which is direct Federal funding on a 50 percent basis to the state, we spent sixty-five thousand four hundred sixty-six dollars ($65,466). In mitigation programs which includes the Columbia River program, again

a hundred percent funding but again a mitigation for the dams on the Columbia River, there was an expenditure of four hundred seventy-seven thousand one hundred one dollars ($477,101), providing a total annual expenditure of one million six hundred thirty-six thousand two hundred and forty-seven dollars ($1,636,247).

Q. Mr. Millenbach, have you computed the percentage that each of these numbers represents to the total one million six? A. Yes. The license fee expenditure represented 67 percent; the Federal Anadromous Fish Act expendi- [146] ture represented four percent; and mitigation expenditures represented twenty-nine percent.

Q. Of the sixty-five thousand four sixty-six on the Federal Anadromous Fish Act fund were any of these funds available and used on the Puyallup watershed during that fiscal period, '72-'73? A. During that period we had a project of gathering steelhead statistics and other information on anadromous fish. We had one biologist working on the program and he was assigned to the Puyallup River for the winter season of '72-'73. The Anadromous Fish funds attributed to that activity amounted to approximately three thousand dollars.

Q. Were any other funds utilized in that sixty-five thousand four sixty-six for the Puyallup watershed? A. No.

Q. Was any of the four hundred seventy-seven thousand one hundred one dollars, entitled mitigation, applied to the Puyallup watershed? A. No.

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[147] Q. When did the Department of Game first commence planting steelhead in the Puyallup watershed? A. The earliest plants of record date back to the first year that the Game Department was created which is 1933, and generally the river system has been planted annually since that time. I think it's significant to point out that in the early decade, '33 to about the 1940's, that most of the steelhead handled at that time were handled in both the Department

of Game and Department of Fisheries hatcheries. The reason for this was that the Department of Fisheries maintained racks for their salmon cultural activities and it was convenient to also trap steelhead at those facilities. When I first went to work for the Department I recall—this was 1940—that the Department was annually reimbursing the Department of Fisheries for their activities in fish culture on behalf of steelhead. As we increased—we, the Department of Game—increased its hatchery facilities there was more effort put into rearing steelhead and then for the next decade, basically the 1940's, many of the fish planted were yearly fish but were sub-smolt in size because we did not have the capability of raising steelhead to smolt size in one year.

Then I think the significant planting in the Puyallup River system really relates to about 1950 when as a result of improved diets and as a result of improved fish culture we did have a significant portion of the number that were planted were of smolt [148] size and contributed to the fishery. Since that time we have firmed the program up to where smolts only are reared and released into the Puyallup River system.

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[157] Q. With a return of 7,500 fish from this hatchery stock what does this represent as the per adult steelhead cost to the Department of Game for this hatchery program on the Puyallup River? A. Well, if the entire ten percent were caught it would represent roughly $3.72 a fish.

Q. Well, it would mean then, according to your answer, that for each returning fish the Department has invested $3.72 directly. A. Yes.

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[162] Q. Could you please give us the percentage of the total revenue that license fees represent for each of those three exhibits, and please identify the exhibit. A. Yes.

#74-3, the license revenues represented 74.9 percent of total Departmental revenues. In Exhibit 74-4 the license revenues represent 78 percent of the total revenues. And for Exhibit 74-5, the license revenues represent 76.1 percent of the total revenue of the Department.

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[165] THE COURT: You can buy a combined hunting and fishing license?

THE WITNESS: Yes.

THE COURT: How much is that?

THE WITNESS: That's twelve dollars.

THE COURT: And you can also buy just a fishing license?

THE WITNESS: Yes.

THE COURT: How much is that?

THE WITNESS: Seven and a half.

THE COURT: And then in order to fish for steelhead you have to buy a punch card, and that's two dollars.

THE WITNESS: Yes.

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BY MR. MACKIE

[166] Q. Are there three classes of individuals who are not required to obtain a fishing license or pay the steelhead punch card fee? A. Yes.

Q. Would you identify those three groups? A. Juveniles, oldsters who are individuals who have lived in the state for at least ten years prior to applying for the license who have attained their 70th birthday, and Indians are not required to buy a license or punch card.

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[176] Q. Does the Department of Game tag a fish or tag the fish which are planted through the hatchery program? A. Through the years the Department has marked a large number of groups of fish in continuing research attempting to identify the best procedures and procedures that would lead to the maximum survival and results in the program. This generally involved the excision of a fin—one or more fins—so that the fish is identified for future observation. We have incidental to the hatchery rearing of fish an accidental marking of steelhead in that a large proportion of steelhead reared to smolt size in a normal rearing pond receive an injured dorsal fin as a result of the high density of fish involved and this becomes essentially a permanent mark. The degree of deformity ranges, of course, all the way from very slight to an almost complete excision or disappearance of the dorsal fin. Where we have not carried out a specific marking experiment such as removing the adipose fin or ventral fin we have used the observation of the deformed dorsal fin as a measure of returns of hatchery plants.

THE COURT: Where is the dorsal fin located on the fish?

THE WITNESS: On the top side of the fish, right in the middle of the back.

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[179] BY MR. MACKIE:

Q. Are you aware of a study which leads you to any conclusion as to the percentage of the hatchery fish that do not have dorsal fin damage as an identifying mark? A. Yes. Dr. Loyd Royal reported on one experiment that we ran at the South Tacoma Hatchery where a group of fish were marked by the removal of other fins and when the adults returned to the hatchery there was a record kept of the percentage of marked fish which did not have a deformed dorsal fin, and in that instance it was 14 percent.

THE COURT: Excuse me. Fourteen percent did not have the deformity of the dorsal fin, is that right?

THE WITNESS: They had the normal appearing and unidentifiable dorsal fin from a hatchery standpoint.

BY MR. MACKIE:

Q. Now, returning to the 1972-73 creel census on the Puyallup River—62-63, excuse me, I misspoke myself, it should be 62-63; did the personnel of the [180] Department conducting that study examine the fish for dorsal fin damage? A. Yes, and they kept a record of that.

Q. Did they upon encountering fish with such damage record it as being a hatchery fish? A. Yes.

Q. What percent of the total catch was reflected then as being hatchery stock by that examination? A. Sixty-one percent.

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[184] Q. Mr. Millenbach, a creel census was also taken in 1972-73, was it not? A. Yes.

Q. And a report was prepared and submitted to you on that creel census? A. Yes.

Q. Who conducted or was primarily responsible for that creel census? A. Most of the work was done by John Hisata, a fishery biologist.

Q. The creel census that was conducted under his direction resulted in a conclusion as to what percent of the total catch reflected hatchery stock? A. Yes.

Q. What percentage? A. What percent was it? It was 49 percent.

Q. Was that done on the same basis of examining the fish for dorsal fin damage? A. Yes.

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[197] Q. You have made reference to an escapment level of 50 percent. As a manager of the fishery resource what is normally sought as an escapement level for steelhead in

a watershed that is not augmented with hatchery stock? A. As a result of our experience in steelhead management we feel that a desirable escapement level is at approximately 50 percent of the run.

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[199] A. The hatchery fish would be added on to the wild fish and any fish provided through that hatchery program could be deducted from the spawning escapement. So that you could actually have a lower percent escapement of the total run; in other words, if we started with 6,000 wild fish and we added 6,000 hatchery fish we could still take—we could take 9,000 and still retain our 3,000 escapement and the 9,000 of course would be more than 50 percent of the total twelve that I'm talking about.

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[209] Q. Have you computed the percentage of steelhead caught to the total of salmon and steelhead caught in the State of Washington? A. Yes.

Q. What percent is the result of that computation? A. For the year of 1971 it is figured out to be three and [210] three-tenths percent steelhead.

Q. Do you recall the base number of salmon and the base number of steelhead used in that computation? A. The base number of salmon as I recall, and this included pink salmon, was 7,777,000, to round it off, and the steelhead catch for that year of 1971 was 246,000 fish.

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Q. Can you explain briefly the need for statistical information of run size and the economies of the same with reference to a hook and line fishery of steelhead? A. Yes. As I pointed out the population is a relatively small one. The characteristics of the fishery involve a rather long period of time, generally a minimum of three to four months, and in dealing with the catch statistics on a small population caught in some 180 streams throughout the

State and over a long period of time, it becomes extremely difficult to get precise catch information. And because of the inefficiency so to speak of the hook and line gear which eliminates any real concern of an over fishery in most instances, because of this inefficiency, in our management approach we have concluded that the catch statistics developed through the punch card are adequate for management purposes.

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[211] Q. Mr. Millenbach, has the Department computed on an annual basis the average number of steelhead that are caught by the average individual steelhead fisherman? A. Yes.

Q. What is that number? A. Basically, we take the gross catch of approximately 300,000 fish as an average steelhead catch in this State, and we have approximately 150 to 160,000 steelhead fishermen a year; a small percentage of those don't [212] fish, but it comes out to an average of about two steelhead per fisherman per year.

Q. Has the Department also computed at times the average number of hours that a fisherman expends in catching a single steelhead? A. Yes. In our creel census work we frequently record catch per hour information, and we have noted that when a steelhead is caught with about 12 to 15 hours of fishing effort that this is considered a good fishery, success is relatively high. But there are other times when as high as 40 to 50 hours of effort is expended to catch one steelhead.

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[218] Q. Mr. Millenbach, have you examined that draft report? A. I've had a chance to glance through it, yes.

Q. How many days did your staff participate in sampling on the Puyallup watershed for this creel census? A. Fifty-seven days.

Q. And this is for the fishing season 1973-74? A. Yes.

Q. Was the length of that season comparable to the last year's season 1972-73? A. Yes.

THE COURT: How many days?

THE WITNESS: We had 121 days, Your Honor, in the regular season.

BY MR. MACKIE:

Q. How many anglers were interviewed in the course of this 1973-74 census? A. Three thousand two hundred forty-three.

Q. How many steelhead did your personnel encounter in the course of those interviews? [219] A. Two hundred fourteen.

Q. And what number of those 214 reflected dorsal fin damage reflecting that they were hatchery fish? A. Forty-two percent.

THE COURT: How many fish?

THE WITNESS: Excuse me, Your Honor. The total is 90.

BY MR. MACKIE:

Q. What percent of the total number of steelhead examined thereby reflect the damaged dorsal fin? A. Forty-two percent.

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Q. Mr. Millenbach, handing you what has been marked as Plaintiff's Exhibit #22, what is this exhibit entitled? A. This is entitled "Puyallup River Creel Census 1973-74."

[220] Q. Was this prepared by a member of your staff? A. Yes, by Mr. Dave Gufler. He is a regional biologist.

Q. What period of time is covered by that report? A. The month of December 1973.

Q. Is this information included within the composite report referred to as Exhibit #21? A. Yes.

Q. In examining the report by Mr. Gufler how many days were involved in his portion of the creel census on the Puyallup watershed? A. Thirteen.

Q. Would all of those days have been in the month of December? A. Yes.

Q. How many fishermen or anglers did he contact in the course of that? A. Nine hundred and twenty.

Q. How many steelhead did he find in the course of those checks? A. Eighty-eight.

Q. How many of those steelhead reflected dorsal fin damage reflecting that they were hatchery fish? A. Forty-six.

Q. What percent of the total steelhead checked by Mr. Gufler reflected that they were hatchery planted fish? A. Fifty-two percent.

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[223] Q. Mr. Millenbach, in your section on fish management do you have other biologists who report to you? A. Yes.

Q. How many biologists do you have on your staff? A. We have totally in the Fisheries Division eighteen field biologists and I have two research biologists on the office staff, plus three biologists staffed with the Division.

[224] Q. Do those individuals hold any form of specialized educational degrees, who hold those positions? A. They all have Bachelor of Science degrees in fisheries or equivalent fishery biologist degrees.

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Cross Examination

BY MR. RODGERS:

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[240] Q. Now, the question, Mr. Millenbach, and what I'm trying to get at, as I recall we established earlier how much goes into the Game Fund from the sale of punch cards. Now, I want to establish if we can how much goes

into the Game Fund for fishing licenses held by steelhead fishermen in the State of Washington. A. To precisely determine that would be very difficult because you don't have a break out of the combination license holders and the straight fishing license holders related to the permit. You can get a permit under any one of those two. In fact, you can buy a permit under a county license yet.

Q. Can we have a general estimate? Would it be about a million dollars? A. That would hit reasonably close, yes.

Q. So, if we added together the contributions to the Fund of the sale of punch cards and licenses combined we would get a figure of one and a quarter million dollars, approximately? [241] A. Adding those two figures you would, yes.

Q. That's about ten percent of the Game Fund based on the eleven million dollar figure you gave us earlier? A. It would be ten percent of that figure, yes.

Q. Do you know whether the steelheaders get back from the Game Fund more than they pay in? A. I don't know of any effort to clearly determine this. I personally have made no effort to. In a general way I believe that our programs reflect license revenue but there has been no precise effort made to determine and associate funds with programs.

Q. Do I recall correctly your testimony of yesterday indicating that you had statewide expenditures by the Department for the operational costs of the steelhead hatchery program of $1,636,247? A. That included more than the hatchery program, yes.

Q. All right. What are the additional costs included in that figure? A. Additional costs were the costs attributed to the Fishery Management activities, the Environmental Management activities and the Wildlife Management Act.

Q. Based on that can you yet make an estimate as to whether steelhead fishermen are getting back more than they're paying in? A. Well, the figures that you developed are slightly over a million dollars and the figures here of course exceed that.

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[250] Q. Mr. Millenbach, as to the Puyallup River you testified yesterday with respect to Exhibits 74-2 which was entitled "Puyallup River System Steelhead Plants and Catch,"—do you have that exhibit before you? A. Yes, a copy of it.

Q. As you indicated yesterday we have two columns, one [251] under "Indian" and one under "Sports," is that correct? A. Yes.

Q. Is it your testimony that we could get a fair comparison of the Indian and sports catch by comparing the respective columns? A. No, I don't believe so.

Q. And your reason for that is? A. The reason for that is the Indian catch is only as available and does not have as strong a foundation as the sports catch which we relate to the punch cards.

Q. So it is your testimony that the Indian data is insufficient on the basis of that exhibit to make the comparison I'm asking about? A. I think generally that's true, but for the period from '54 to '63 when there was no problem over the Indian fishery I believe the figures are fairly representative.

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[269] Q. Would it be fair to say that the dominant ingredient of your smolt release decisions would be sportsmen satisfaction? A. That's a dominant one, yes.

Q. But I believe you testified it is not the sole one. A. Yes.

Q. If Imight turn to a few historical matters, Mr. Millenbach, am I correct in assuming that the Game Department has no data or information on the extent of the steelhead run on the Puyallup River drainage system during the decade of the 1840's to '60's? A. That is correct.

[270] Q. Do you know whether the Puyallups at the time of signing the Treaty of Medicine Creek in 1854 took steelhead? A. I would believe they did, but I don't precisely know it.

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[271] Q. Is it a fact, Mr. Millenbach, that the science of rearing fish artificially under controlled conditions has been known for centuries? [272] A. I am not familiar with other species, but the fish culture relating to salmonoid dates back——

THE COURT: Fish what?

THE WITNESS: Other fishes.

A. (Continuing) Artificial propagation of fish culture as far as salmon and trout are concerned relates back to about 1875, I believe.

BY MR. RODGERS:

Q. You are familiar, are you not, with the Game Department's pamphlet on the Washington Trout Hatcheries? A. I know we have one.

Q. And is it your experience that Game Department publications are accurate? A. If I write them, yes.

THE COURT: He didn't write them. Let's don't tar him with the brush he didn't paint with.

BY MR. RODGERS:

Q. Do you have any basis for disagreeing with this statement from the Washington Trout Hatcheries—Washington State Game Department Trout Hatcheries pamphlet, "The science of rearing fish artificially under controlled conditions has been practiced since the earliest history of man"? A. My recollection is that the earliest reference to any artificial propagation of fish that I've seen relates to China and carp. I don't precisely recall that that predates historical man.

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[273] Q. Generally you've testified as to the number of hatcheries and rearing ponds used for steelhead propagation purposes. [274] A. Yes.

Q. These facilities are centralized primarily under your direction, is that correct? A. They are all under my direction, yes.

Q. Is it a fact that personnel occasionally are transferred from one facility to another? A. Yes.

Q. Is it a fact that eggs and fingerlings are transferred from facility to facility? A. Yes.

Q. Is it a fact that fish trapped at different—fish are trapped at different locations to provide eggs at your facilities? A. Yes.

Q. Would it be fair to call your management of steelhead hatcheries and rearing ponds in Washington State an integrated operation? A. Yes.

Q. Turning now to the Puyallup Hatchery or the several hatcheries there involved, as I recall your testimony you say you take eggs for the Puyallup River smolts from the Chambers Creek steelhead entrapped at Chambers Creek, is that correct? A. From steelhead trapped at Chambers Creek and transported to the South Tacoma Hatchery, yes.

Q. Does that run into Chambers Creek—is that run a natural or artificial run? A. It was a natural run and has been increased through artificial propagation.

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[275] THE COURT: By that do you mean you release the smolt from the Chambers Creek area and then they return?

THE WITNESS: Yes, Your Honor. In fact, the actual number is about 50,000 smolts a year to maintain the run of Chambers Creek.

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BY MR. RODGERS:

Q. Now, your testimony, as I recall, you take the eggs to South Tacoma, the fingerlings are reared at South Tacoma and then transferred to the Puyallup Hatchery? A. Yes. The program is accomplished in two different ways. Some years the small fingerling are hatched at the South Tacoma Hatchery and transferred as fingerling directly to the rearing ponds at the Puyallup Hatchery. In other years, due to the overall programing we have moved eggs directly from the South Taco- [276] ma Hatchery to the Puyallup Hatchery for incubation and hatching and then rearing.

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Q. . . . If something happened to your South Tacoma supply of steelhead would it be possible to draw upon other hatcheries for your Puyallup stock? A. Yes.

Q. Is it common that an entire supply of fingerlings [277] could be destroyed by disease or otherwise? A. It's a possibility but extremely—I wouldn't say extremely uncommon, but it is uncommon. For instance, at the South Tacoma Hatchery we have never had such an experience in the time that I've been involved.

Q. It is a fact, is it not, that if you wanted to, beginning tomorrow, you could decree that fingerlings from—well, perhaps not beginning tomorrow—is there any principle of fisheries management that would preclude your reliance upon fingerlings from the Chambers Creek facility to supply the Puyallup facility as opposed to the present reliance on the South Tacoma Hatchery? A. There's no principle of management that would preclude that. In fact, our steelhead program has been developed primarily from the single source of eggs, however, there are many opportunities where the Department could obtain steelhead eggs as a result of our fish cultural operation, but Tacoma is the most convenient, the most efficient and the most practical.

Q. From a point of view of convenience, the Chambers

Creek facility is not that much farther away from the Puyallup facility than the South Tacoma Hatchery, is it? A. No, the Chambers Creek Hatchery is within a quarter of a mile of the South Tacoma Hatchery.

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[291] Q. Directing your attention, Mr. Millenbach, to the entries under the month of June, particularly the last entry, the one beginning "101,010—— A. Yes.

Q. Could you—— A. This entry shows the transfer of 101,010 Cowlitz River steelhead weighing 91 in the pound, total weight of 1,110 pounds was transferred from the South Tacoma Hatchery to the Puyallup Hatchery.

[292] Q. Don't you interpret that as indicating a transfer from the Chambers Creek Hatchery to the Puyallup Hatchery? A. Yes, I do, and these fish were not released, however, into the Puyallup River as a result of it.

Q. All right. Could you tell us what happened—have we established then that 101,000 winter steelhead have been shipped from the Chambers Creek Hatchery to the Puyallup Hatchery? A. Yes.

Q. All right. Then what happened to the steelhead? A. They were transferred back to the South Tacoma Hatchery for additional rearing.

Q. How long did they stay at the Puyallup Hatchery? A. The record is not here and I don't know offhand.

Q. Could it have been a period of a month? A. I would assume it was a period of less than two months, although I don't know offhand.

Q. Is it fair to assume that during their stay at the Puyallup Hatchery they received feed and other maintenance? A. Yes.

Q. Is it a common practice to transfer steelhead from Chambers Creek—from the Chambers Creek facility to the Puyallup facility for a short period of time? A. No, I would not consider it a common practice.

Q. Do you know the reason why this transfer was made? A. I don't know offhand, no.

Q. Would it have been possible that this transfer was [293] made in anticipation of 101,010 winter steelhead being released or being part of the plant in the Puyallup River? A. No, because the plant in the Puyallup River was of Chambers Creek origin—now that's Chambers Creek for the adults to the South Tacoma Hatchery to the Puyallup Hatchery for the rearing of smolts for the Puyallup River. The report that we refer to here in the transfer of 101,000 Cowlitz River steelhead involve a different program.

Q. Is this program separately financed under the books of the Game Department? A. No.

Q. Do you maintain separate financial accounts for the Chambers Creek and South Tacoma facilities? A. Yes, and if I may clarify my previous answer, I related the separate accounting to different funding. Yes, we keep separate records, complete financial records at each and every facility.

Q. Now, you've indicated to us that it is possible that a truck used at the Chambers Creek facility might also have been used at South Tacoma. Can you think of any other facilities or equipment from Chambers Creek that could be used also at South Tacoma? A. All of the equipment in the operations are considered to be a general Department of Game operation. There are general Department of Game funds invested in the program and we make no attempt to isolate individual pieces of equipment or individual things and relate it [294] to a specific project and only use it there.

Q. That wouldn't make any sense from a management point of view, would it? A. That is correct.

Q. And in fact no distinction would be made along the lines that you suggested with respect to equipment purchased for or provided for other facilities funded under the Anadromous Fish Act. A. I would say only that depending on the project, it's location and so forth, which

might in itself—for example, like the Bogachiel rearing pond which is isolated. The Bogachiel rearing pond, by way of explanation, is located at Forks, Washington; that is isolated from other facilities and we would not have interchange of equipment as you might in the case of Chambers Creek and South Tacoma. But other than that the facilities are generally treated as Department of Game facilities.

Q. Mr. Millenbach, does the Federal funding for the Chambers Creek facility cover in any way the salaries of the employees? A. Yes.

Q. And might those employees engage in work at other state funded facilities during the course of their employment by the Department? A. Yes, the same as other departments' personnel might be assigned to Chambers Creek who are not normally there.

Q. And they would attend departmental meetings? [295] A. Yes.

Q. Engage in departmental policy work? A. Yes.

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[308] Q. Your Department has the power, does it not, to destroy the natural fish population in a lake? A. Yes.

Q. In fact, is it not part of your Department's programs to engage in that policy? A. Yes.

Q. Could you please explain the purposes of that program? A. Yes. The practice of removing the population in a lake relates to a program we call lake rehabilitation. It's used to remove a population of fish which is providing an undesirable level of return to the fisherman and a low rate of production. This generally relates to the occurrence of exotic species which set up a competitive program, competitive situation with trout which are the native fishes with the resulting factors of very low survival of hatchery fish and very low levels of production. In the process of removing the entire population as managers then we can come back with a species of fish which will give us a high

level of return at a minimum cost from that particular body [309] of water.

Q. And you describe that process as rehabilitating a lake? A. Yes.

Q. Do you have the power to rehabilitate, as you've described it, a river system? A. The Game Commission has the authority to approve the removal of the game fish from a river system, yes.

Q. So you do have the power, if you wish to exercise it, to destroy the natural run in the Puyallup River and replace it entirely with an artificial run? A. I would say as a practical matter, no, because there are other species involved. The salmon population certainly the Department would not have the authority to destroy, and from a practical standpoint it would be impractical.

Q. From a policy point of view would you believe that that step would be desirable? A. No.

Q. There would be no problem if you did do it of any possible competition between the natural and the artificial species. A. I'm sure that the agency responsible for the other species would object and we would not override them.

Q. Is there any way technically to exterminate only the natural steelhead? A. No.

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[310] Q. What is a residualized steelhead? A. I think Dr. Loyd Royal related that to steelhead smolts planted from the hatchery which did not move to salt water and thus took up residency in the stream in which it was planted.

Q. Would you agree with Dr. Royal's conclusion on page 87 of his report that residualized fish become competitive with the wild fish, hence any survival is probably deductible from that of the wild population? A. Yes, I think generally that would be correct.

Q. Of the 100,000 steelhead smolts planted by your Department in the Puyallup system in 1970 can you give us

an estimate as to how many of that number became residualized? A. We have no specific information. The average size of fish indicated they were all smolts and I would suspect that essentially all of them moved to the marine environment.

Q. Have you done any studies on the Puyallup River system to indicate the extent of residualization from your smolt plants? A. No.

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[311] THE COURT: Does a residual fish that stays in the Puyallup and never goes to sea, is he different when you catch him than a fish that's migrated to salt water and comes back?

THE WITNESS: Yes, Your Honor. If he lived to survive very long he would grow only a very slow rate and he would either have to be caught or he would die. The life term of them probably would be only a few months, however, some few might survive to go to sea the following spring. In some of our early work with summer steelhead we had difficult in raising our fish to smolt size—this was back in the late 1950's—and we did observe fish in the river that appeared to residualize and there was indication that some of them moved out the following spring. The reason I say that is because they were marked and when the returning adults came back it showed a longer time frame for those fish that had residualized for the balance of one year in fresh water.

THE COURT: They can't take up permanent occupancy then, for example, in the Puyallup River and stay in fresh water their entire life span and live a natural——

THE WITNESS: It's possible, but the number of fish that would do so is exceedingly small. Most of [312] our anadromous fish streams have very, very few resident rainbow that don't go to sea.

THE COURT: The instinct is pretty strong then.

THE WITNESS: Yes.

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BY MR. RODGERS

[317] Q. When you extract eggs from a fish taken, let's say, at Chambers Creek is the fish killed by that process? A. At South Tacoma Hatchery we did develop and maintain a procedure in which the adult females are killed for spawning purposes. The reason for this is, we increase the number of eggs, viable eggs that were available per fish, we increased the hatchability of those eggs with the result that it required a much—or at least a reduced number of adult fish to support our program and minimizing then the sacrificing of fish for this purpose. Also there is the aspect of only about five percent of the adults return to spawn a second time anyway, so we weren't sacrificing really a significant number of fish as far as future fishery is concerned.

Now, in our summer steelhead program we have developed a little different technique and we do not [318] destroy the females in this particular operation.

Q. It's true that at South Tacoma you would sacrifice a natural steelhead taken that might otherwise be able to reproduce. A. Yes, if it were among the fish that we picked up.

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[339] Q. Is there a generally accepted criteria for determining when a nip on the dorsal fin is sufficient to indicate that the steelhead was hatchery reared? A. We have no precise definition of it, but any deformity that is observable is classified as a deformed dorsal fin.

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[352] Q. Let's take all three of your separate computations, Mr. Millenbach. Is it your testimony as an expert in Fisheries Management that the three figures that you've

given estimating the size of the natural steelhead run on the Puyallup are based upon scientifically reliable data? A. My answer would be yes, to the extent of the broadness of the data that we have; recognizing that the data does not relate to a predetermined study to give what might be described as a more complete record of actually what is happening. The basic information I used was data which was gathered incidentally and has to be treated within that purview.

Q. Nonetheless, you believe as I construe your last statement that the estimates within those qualifications are scientifically reliable. A. Yes.

Q. And in fact, is it true that these are figures that you would rely upon in establishing any regulations that may result pursuant to the order of this Court? A. I believe that the figures as used here have decided limitations and that if we were instructed by some court order, to say, allocate the fishery, to do it in a meaningful way would require broader information and more complete information which could be obtained through a special designed effort to do so.

Q. But you'll agree with me then that the figures you have offered would, in your opinion, not be sufficient to make a reliable allocation? [353] A. As a manager I would prefer to have much additional information, but until that such information is available I think the decision would have to be based on what is available.

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[378] Q. ... Just a few more questions, Mr. Millenbach. Do you recall making a statement before the Game [379] Commission on October 2 of 1972? A. Yes.

Q. Do you recall reporting on the steelhead situation at that time in the Puyallup River Basin? A. I believe there was some reference made to it.

Q. I only have a single question and perhaps we can do it without reference to the document. Did you make a recommendation on that day to the Commission? A. Yes.

Q. What was that recommendation? A. That the resource—that there be no commercial Indian net season set on the Puyallup River.

Q. Do you remember saying, because there is no information on ocean abundance we are unable to reliably predict annual size? A. Yes.

Q. And do you remember saying, we have no predictions on the run of steelhead? A. Yes.

Q. Now, do you recall also, Mr. Millenbach, making a statement before the Commission in August of 1973? A. Yes.

Q. On that occasion did you also have a recommendation with respect to the Indian fishery on the Puyallup River? A. Yes.

Q. Do you remember saying on that day as follows: No information is available on the take of steelhead [380] by foreign gill net fleets on the high seas, but research has established that steelhead can be taken with such gear. Literally hundreds of miles of highly effective monofilament net is used in this fishery. A. Yes.

Q. Now, do you believe, Mr. Millenbach, that the foreign fishery takes a substantial percentage of the steelhead that are initially smolts from the Puyallup River system? A. I believe that the potential is there for the foreign fleets to intercept the steelhead from the Puyallup River system. It is very unfortunate that there is no specific data relating to that.

[Q] Thank you.

Mr. Millenbach, do you recall in your concluding paragraph in your presentation to the Commission in August of 1973 stating as follows——

THE COURT: What was that date again?

MR. RODGERS: August of 1973.

BY MR. RODGERS:

Q. "The Department finds little evidence in the available data and observations for suggesting that the 1973-

74 steelhead run will be larger than the 1969-70 run. We have no capability of accurately forecasting run size—no agency, Federal or otherwise, can—and on the basis of the data we do have cannot recommend a commercial net season for steelhead." A. That is correct.

[381] Q. I believe you may have testified to this, but does the Department yet have the capability of estimating run size? A. No.

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[385] Q. I believe testimony established yesterday that in June of 1973, 101,000 winter steelhead fingerling went from the Chambers Creek facility to the Puyallup Hatchery, is my recollection correct? A. Yes.

Q. And they stayed there for some time. Did we establish how long? A. I checked the records in the office last night and determined that that 101,000 fish was planted in July of 1973 in Steilacoom Lake. So, obviously, from the record they were surplus to our rearing needs.

Q. Do I understand you to have corrected your testimony of yesterday which I understood to say that they went back to the Chambers Creek facility? A. My recollection is they went back to the South Tacoma Hatchery. I said I didn't have the record, but my recollection was they were transferred back to the South Tacoma Hatchery. Actually, the South Tacoma Hatchery personnel planted the fish in Steila-[386] coom Lake.

THE COURT: Those were steelhead?

THE WITNESS: Small steelhead fingerling, Your Honor. We normally in our program take a surplus of eggs so that we can select out the best quality fish available and wind up with some surplus of very small fingerling, and the procedure now is to release these into lakes where there will be maybe some survival.

THE COURT: You put them in Steilacoom Lake. Steilacoom Lake is drained by Chambers Creek.

THE WITNESS: Yes.

THE COURT: Wouldn't they reach smolt size and go to sea that way?

THE WITNESS: If any of them do survive, and there's a possibility a few could, they could do exactly that, Your Honor.

THE COURT: You mean they could survive—you mean they can't live?

THE WITNESS: They usually——

THE COURT: The people on Steilacoom Lake, the fishermen, aren't going to catch them all, not 101,000 fingerling.

THE WITNESS: Your Honor, a fingerling of that size planted in a mixed species lake, which contains bass, croppies, perch, sunfish and others, there's a very low survival of fish to catchable size.

THE COURT: You are just feeding the available——

THE WITNESS: We fed the other game fish with [387] steelhead fry, I guess.

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Cross Examination By Mr. Sennhauser

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[403] Q. The Department of Game—You would agree that the Puyallup River as you presented in your evidence has benefitted to a small degree by Federal funding. A. Yes.

Q. And there are other streams and rivers which receive a much higher degree of benefit proportionately from Federal funding than the Puyallup.? A. Yes.

Q. Now, would you agree that the Department of Game is able to put more monies into the Puyallup River because of a reliance on Federal funds for other rivers? A. I

don't think the allocation of funds to expenditures are made in that manner. To say that they could be, [404] I would say yes, but our steelhead program is related to the rivers that are to be planted and the funding, irrespective of its source, supports the program.

Q. In other words, the Department of Game funds steelhead propagation facilities and production from all sorts of different funding sources and the results or benefits that accrue on the Puyallup or Skagit can't be linked directly to any specific source of revenue that comes directly to that river. A. Other than as we have shown, there have been no fish from the Federally supported facilities going into the Puyallup River.

Q. If the Federal funding were cut off for the Department of Game as a result of other rivers receiving a high percentage of these funds, would not the Department of Game have to cut back as well on the Puyallup River, even though there was no Federal funding going directly into the Puyallup River? A. Not necessarily so. I would relate to the record of fish planting in the Puyallup River which showed a level of approximately 60 to 70,000 smolts before we had any Federal funding in our steelhead program.

Q. Are you aware in 1973 that less than 1,000,000 smolts could have been planted by the Game Department without any reliance on Federal funds? A. Again, if you give me just a second here I think I have some records in that regard.

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[405] Q. Do you know how many smolts could have been planted by the Game Department without any reliance on Federal funds?

MR. MACKIE: Would you give us a time frame?

Mr. SENNHAUSER: 1973.

A. If we include the Columbia River programs mitigation funds and add to it the production in the P.U.D. mitigation

hatcheries and then add the production from straight State funding, I have approximately 2,000,000 smolts—winter run. In addition to that I have 1,700,000—in round figures—summer runs. The balance under Federal funding then, which would be D.J. which is in effect sportsmen's dollars, and the 50 percent Anadromous, is approximately 1,300,000.

THE COURT: Now wait just a second, I don't understand that a bit. The question was, did you in fact, or could you have planted less, and I understand this to be "did you?" In other words, the State [406] financing alone, without any Federal monies, could only produce 1,000,000 smolts in 1973. That's the question and it's yes or no.

THE WITNESS: I would answer yes, Your Honor, if I may with the qualification that this does not include any production from mitigation hatcheries.

THE COURT: In other words, the production from mitigation damages is in addition to the 1,300,000 smolts.

THE WITNESS: Yes.

THE COURT: Can you figure how many smolts you produced with the Federal funds alone?

THE WITNESS: If we define Federal funding, Your Honor, as Anadromous Fish or D.J. funding—D.J. is Dingell Johnson funding which is a tax on fishing tackle that comes back through an allocation to the states; if you classify that as Federal funding I can give you the figure of 1,210,000, in round figures, that are smolts that are planted under the Dingell Johnson and Anadromous Fish funding programs.

THE COURT: Is that $1,210,000?

THE WITNESS: No, smolts, Your Honor.

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Redirect Examination By Mr. Mackie

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[424] Q. Has the Department engaged in a planting program to put summer steelhead in streams which did not have a natural run of same? A. Yes.

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Redirect Examination By Mr. Willner

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[438] A. On November 28, 1973 the State Game Commission established certain commercial gill net seasons for Treaty Indians including a season on the Puyallup River.
[439] Q. When was that season? A. That season was established on November 29th, 1973; the starting date as I recall it was December 3.

Q. How long did it go on? A. It has extended to the 17th of January with weekend closure periods from, as I recall it, six p.m. Thursday evening to six p.m. Sunday evenings.

Q. Did your Department observe the number of Puyallup Tribe commercial net fishermen that were fishing during that season? A. Yes.

Q. How many were there? A. Our wild life agents patrolled the river and talked to a number of the fishermen and they estimated that there were from 14 to 20 fishermen most of the time, and I have received fish buyer tickets reporting the names of 23 different individuals.

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Q. Mr. Millenbach, you previously testified that members of treaty Indian tribes do not pay a State license fee for fishing, is that correct? [440] A. Fishing in their ceded area.

Q. Do members of the Puyallup Tribe pay any money to fish the Puyallup River? A. No.

Q. Now, does the Department of Game at no cost to the members of the Puyallup Tribe provided any services

which enhance the Puyallup Tribe fishery? A. Well, the hatchery planting of smolt steelhead have contributed substantially to the net catch in the Puyallup River—the Indian net catch.

Q. What other ways have you assisted their fishery? A. In the general protection of the watershed, particularly the activities of our wildlife agents who constantly surveil the general area to make sure the game laws are not being violated, that someone doesn't have a net above Mud Mountain Dam, or someone is not destroying fish habitat. This is a very essential part of overall management and protection of the resource.

Q. Have you in addition been working for better fish ladders? A. Yes. We have had considerable communication with Puget Sound Power and Light concerning the fish ladders on the Buckley Diversion prior to the reconstruction in 1942 associated with Mud Mountain Dam, and we of course already mentioned are seeking intervention in the case relating to the Federal Power Commission having jurisdiction to issue a license for current projects there.

[441] Q. Do you do any work with logging companies in connection with maintaining streams, slash and debris? A. Department personnel responsible for our so-called hydraulic law application and hydraulic permits have greatly expanded their efforts in communication with logging operators to minimize the adverse impact of logging on the stream environment.

Q. Do you intervene on water rights applications? A. We review all water right applications and make recommendations for the preservation and protection of fish life.

Q. Do you do research on steelhead trout and ways of improving the run? A. Yes. This has been a continuing thing with the Department.

Q. These activities you just described, do they benefit the Puyallup Tribe fishery? A. Yes.

Q. Are those activities paid for from the Game Fund? A. Yes.

Q. Mr. Millenbach, you told us, but tell me again, when did you start working with the Department of Game? A. In 1940.

Q. Have you been with them ever since? A. Yes.

Q. Since 1940 has any Federal monies been used for the rearing of steelhead trout planted in the Puyallup River? A. No.

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Recross Examination By Mr. Rodgers

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[445] Q. How many fish are destroyed in the production of the eggs for your hatchery program? A. At the South Tacoma Hatchery we take 3,000,000 eggs and there are 3,000 eggs per female so that would be a thousand fish.

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Q. With respect to the density factor about which Mr. Mackie questioned you, isn't it a fact when the return [446] from the plant drastically falls off we can assume that there's been a higher rate of mortality? A. Yes.

Q. Also, in response to a question put to you by the Court, is it not then fair to assume that the reason for this mortality is that there have been too many competitors for the available food supply? A. Well this is speculative yet and there may be some other factors that are involved. I know that Dr. Loyd Royal alluded to the marine environment as a possible factor in this density barrier feeling that the estuary itself may not have been adequate in terms of living space and food supply to provide an equal survival to the increased plantings.

Q. In any event, you agree that available food is a very important parameter? A. I am sure it is.

Q. You were also questioned about your policy of planting sub-smolts in the Puyallup River system. With respect to that do you recall when the Department planted 24,300 steelhead fry and/or sub-smolts in South Praire Creek in 1970? A. Yes. You refreshed my memory in calling that figure to mind. I recall that the winter season of 1969 was the lowest run of steelhead in ten years. We were greatly concerned about adequate spawning escapement. We did have some surplus fry available and on that basis there were some scattered plants of sub-smolts made in the fall of that summer.

[447] Q. Do you also recall that the Department planted 20,700 steelhead fry and/or sub-smolts weighing a total of 180 pounds in the Puyallup River tributaries other than South Prairies Creek during 1970? A. Yes, that was part of the same planting that I referred to.

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MR. WILNER: Your Honor, there was a question I neglected to ask him on my cross and I would like permission to ask him now.

THE COURT: All right.

Redirect Examination

BY MR. WILNER:

Q. Mr. Millenbach, you and I were talking before court opened about the smolts that Mr. Sennhauser asked you about which were planted with Federal funds. Do [448] you have a computation there with you as to how many of those smolts were planted with user money, Dingell Johnson money? A. Yes. For the year of 1973 there was a total of 572,000 steelhead planted from projects that were operated under D.J. funds.

THE COURT: Are those matching funds? Does the State have to match any of that money?

THE WITNESS: It's 25 percent matching State money, Your Honor.

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TESTIMONY OF MR. JOHN HISATA. CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Questioning By The Court

[464] Mr. Hisata, this stub dorsal fin has been testified to as being a common characteristic of hatchery fish.

THE WITNESS: Yes.

THE COURT: Have you seen this in the hatchery itself and in the smolt that are put out in the Puyallup Hatchery?

THE WITNESS: Yes, I have, Your Honor.

THE COURT: How extensive is it from your own observation?

THE WITNESS: From my own observation I would say it exceeds 90 percent of the smolt released. This condition will vary as to the method in which, or with which the smolts are raised. If they're raised in rather limited space as occurs at the South Tacoma Hatchery or Puyallup Hatchery they would have more, or I think a greater occurrence of this stub dorsal condition than if they had been raised in a rearing pond with a larger area.

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TESTIMONY OF MR. CLIFFORD J. MILLENBACH. CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Questioning By The Court

[484] THE COURT: This has reference to the regulations that are attached to the amended petition on remand which are the regulations that the State has established on this river regarding Indian fishing, is that right?

THE WITNESS: Yes.

THE COURT: Now, the nets that you folks have allowed to be placed in the river by the Indians, how large are they?

THE WITNESS: In that regulation, Your Honor, we fixed a maximum length of 150 feet. The basis for this was regulation by the Department of Fishery and even a recommended regulation by the Puyallup Indian Tribe previously. I drew on that background to develop the recommended regulation for the Commission's consideration. The 150 foot length is common for what we term set nets in a river fishery. I think the limit derives from that. If it were to be unrestricted as to length it could conceivably extend far enough downstream to effectively net the whole river. I think the limit to the length is for the pur- [485] pose of allowing the escapement of some fish while the net is fishing.

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[488] THE COURT: How actually does this net catch a fish?

THE WITNESS: The fish pushes its head through the net trying to travel upstream and, of course, can't get through the mesh and as it attempts to back out of the mesh the gills entangle in the mesh.

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[489] THE WITNESS: Your Honor, there was an extremely tight time frame from the time the Department received the decision from the United States Supreme Court, and because the steelhead run was starting the Department made its greatest effort to establish a season to accommodate the ruling and to follow the ruling, rather, of the Supreme Court and set a season for Indian people. In arriving at recommendations for such a season I drew on regulations that were in existence. Among them was a proposed regulation by the Puyallup Tribe that had been

drawn up, I believe, about two years previously and may have been exercised by tribal members, I don't know. . . .

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Redirect Examination By Mr. Willner

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[500] Q. Mr. Millenbach, before you continue, do steelhead when going up river tend to hug the bank? A. Yes.

Q. And so when you—can you place a net of 150 feet in length, if you place it correctly, and get most of the steelhead? [501] A. In certain areas the set nets can be extremely effective, particularly in the natural condition of a river where pools and bends in the river created a limited passage. In the case of the Puyallup River in the lower section where the fishery was allowed you don't have the natural bends and angles of the stream—it's basically a channel stream—so the situation in this instance is somewhat different.

Q. So do steelhead still hug the bank? A. They generally travel upstream following certain current patterns and follow the bank. Again, with relation to your point where you do have a natural stream configuration there are instances where a set net can be extremely effective.

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[507] Q. I asked you yesterday if you could develop an estimate for the number of sports fishermen fishing the Puyallup [508] River in any given year. Do you have such an estimate, and how did you derive it? A. Yes. In compiling the catch statistics from the punch cards a record is maintained of the number of cards which had punches for the Puyallup River. This number for the season of 1971-72 was 2,181. We also have a record of the number of successful fishermen and the unsuccessful fishermen, and using that same ratio to apply it to the Puyallup River and the 2,181 successful fishermen, we find there were 2,990 un-

successful fishermen, giving us a total of 5,171 fishermen for the Puyallup River during that season of 1971-72.

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Questioning By The Court

[509] THE COURT: Presumably a sportsman with a hook and line could come in and if an Indian had a net in the river, could the sportsman come in and fish ahead of the net?

THE WITNESS: He certainly could, but it's not a very productive way to fish, Your Honor, if you are going to try and compete with a gill net with a hook and line. It is pretty discouraging, I think, to most fishermen. The recreational fisherman was not excluded from the lower Puyallup River at the time the Indian fishery net season was in progress. Also, Your Honor, I think I'm correct in saying that the majority of the net fishery takes place at night, so [510] you don't have the conflict that way.

THE COURT: Is that right?

THE WITNESS: Set nets, of course, will be set 24 hours a day, but in the Puyallup system in the areas fished there are not a great many set net sites, as I understand it.

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TESTIMONY OF MR. MARK SCHULLER, CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Direct Examination By Mr. Mackie

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[573] Q. Could you describe briefly what you are doing in the course of that study; what is the object of your study. A. Well, I would say the main goal of my study was to develop a way to separate hatchery and wild fish by the scales, and once that was established, to look at the differences in the populations as to size of fish, growth rate, per-

centage of repeat spawners, sex ratio and just every aspect that I could put into it.

Q. In terms of the separation have you utilized an exami[574]nation of the scales to try and indicate a difference for identification purposes between hatchery and native stock? A. Yes, I have.

Q. Steelhead, that is. A. Right.

Q. In the course of your examination and project have you reached a conclusion as to whether scales are, in the study, a valid method of making a determination between native and hatchery stock? A. Yes, I believe that scales are a valid criteria.

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[585] Q. Could you tell us what the total percentage was that you found for the '71-'72 season on the Puyallup [586] to represent hatchery stock of the total examined? A. Of course it varied by month, but the total for that season is 52.3 percent.

Q. Did you make a similar series of computations and a total computation for the '72-'73 season? A. Yes, I did. It is 50.9 percent—excuse me, 50.9 percent for that season, and then we ran a Chi Square test to see if we could group both of those years together.

THE COURT: A what?

THE WITNESS: A statistical test which showed we could group both of these seasons together, that these two percentages were similar.

THE COURT: Would you spell that?

THE WITNESS: That's C-h-i Square.

THE COURT: S-q-u-a-r-e?

THE WITNESS: That's right.

BY MR. MACKIE:

Q. Mr. Schuller, is that sometimes referred to as determining a confidence interval figure? A. The Chi Square

test is not the confidence interval. It's computed simply by just taking a table, you find the mean of all these and you use a table depending on the sample size to put a confidence interval on that.

Q. I note on the bottom portion of Exhibit #27 a reference to 95 percent C.I. equals, and then—— A. Right. If you put a 95 percent confidence interval—out of this size sample of 162 fish your confidence intervals says if you went to the whole population that [587] the percentage of hatchery fish would between 41 and 59 percent.

Q. That confidence interval is combining the two seasons. A. Yes.

Q. Now, you indicated you had run these figures for various streams and rivers in Western Washington. A. Yes.

Q. In terms of percentages? A. Yes.

Q. Do you find that the percentage of wild fish reflected on this study for the Puyallup River is higher or lower, generally, than other streams and rivers for which there is a steelhead planting program in Western Washington? A. This wild population seems to be a little higher.

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TESTIMONY OF MR. GARY ELLIS, CALLED AS A WITNESS BY THE INTERVENOR NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED

Direct Examination By Mr. Willner

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[593] Q. Do you hold a position in the Northwest Steelheaders, Council of Trout Unlimited? A. Yes, I'm Washington State president.

Q. Were you elected to that position? A. Yes, I was.

Q. How many members approximately does the Northwast Steelheaders, Council of Trout Unlimited have in the State of Washington? A. Three thousand.

Q. Do you know who those members are? A. We have a wide range of membership. We have members from throughout the State of Washington.

Q. You have members in every county of the State of Washington? A. Yes, every county.

Q. Do you keep any records on describing who they are? A. No. We have their name and addresses. Briefly, I know we have members that are of probably every race; we have members who are—for instance, I have a chapter president who is a Japanese-American, I have a chapter president who is a Mexican-American, chapter president in Toledo who is an American Indian.

THE COURT: Toledo, Washington?

[594] THE WITNESS: Toledo, Washington, yes. A. (Continuing) we have an Oregon State Director who is a black man. I know that among my members I have loggers, doctors, lawyers and quite a wide range of people who are interested in steelhead fishing.

BY MR. WILNER:

Q. What unites them all? A. Their love of the outdoors, fishing for steelhead generally.

Q. Do you have some estimate of how many of your members fish the Puyallup River? A. Well, we have probably somewhere over 500 members who live in the area around the Puyallup River. They fish it quite regularly. Then in the King County-Pierce County area or greater Western Washington area, I suppose, we have another 500 or so people who travel to the Puyallup to fish, so I suppose we have around a thousand members that fish the Puyallup River regularly.

Q. Where do you yourself live in relation to the Puyallup? A. I live on Waller Road which is about one mile from the lower Puyallup River. My house, my dining room overlooks the Puyallup and I can see the banks of the river.

Q. Do you yourself fish the Puyallup? A. Yes, I do.

Q. How frequently do you fish the Puyallup? A. Oh, I probably fished it 20 times this past season.

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[598] Q. And is the Northwest Steelheaders Council of Trout Unlimited the largest fishing organization in the State of Washington? A. Yes, we are.

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TESTIMONY OF MR. MARK SCHULLER, CALLED AS A WITNESS BY THE DEPARTMENT OF GAME

Cross Examination By Mr. Rodgers

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[624] THE COURT: Excuse me, Mr. Schuller.

As I understand Mr. Rodgers' question he wants to know whether this Department of Fisheries or Department of Game utilize this scale sampling in their management program.

THE WITNESS: As far as I know, they haven't.

BY MR. RODGERS:

Q. All right.

The next question is, you've mentioned two references indicating its use as a research technique. The question is, do you know of a single fisheries management program where scale sampling is regularly used as part of the management effort? A. I don't know.

Q. In fact, you know that it has not been used, is that correct? A. No, I don't know that.

Q. Is it fair to say that the techniques which you studied are still in the process of refinement? A. I would say they're as refined as they can be.

Q. Well, didn't you select this topic for—let me ask you this: Do I understand you are working on your thesis in this area? A. Yes.

Q. And that is towards what degree? A. Towards a Masters.

Q. And is it not a criterion for your thesis topic that a novel subject be scrutinized? [625] A. No, it is not necessarily that. I'm using a research tool that's been

used in another state. I would say the main difference in my thesis and a couple that came out of Oregon State were that I am—I'm using a tool that they used in their research but I'm breaking—I am looking at Washington State steelhead which have not been looked at in such a large scope.

Q. In the course of your examination of the circumstances under which this technique had been usd, you did look at all available literature, did you not? A. Yes, I did.

Q. Did you find anywhere in that literature any references indicating that it was regularly used as a management technique? A. No, I haven't.

Q. Do you know whether this work was funded in part by the U.S. Fish and Wildlife Services and Northwest Fisheries Program? A. Yes, it was.

Q. Incidentally, is your thesis completed yet? A. No, it isn't. All the analysis is done; all I have to do is write it up and it's partly written.

Q. It has partly been written you said? A. Yes, it is.

Q. So this means that it has not yet been reviewed by your thesis committee, is that correct? A. As a written manuscript, no; but as far as data analysis, yes.

Q. They have not approved this work for purposes of meet- [626] ing your thesis obligation as of yet, have they? A. Could you say that again?

Q. Yes. I want to know whether you are, on the basis of the work that you have done, now entitled to your degree toward which you were working at the University of Washington. A. No, I'm not.

Q. And of course it follows that this work has not yet been published in any scientific journal. A. That's right.

Q. Is it a fact that what has been publicly made available is essentially the exhibit that you prepared identified as 74-27 last week, this single piece of paper? A. That's right.

Q. Is it a fact that—as I understand it, you were the author of this exhibit, is that correct? A. Yes, sir.

Q. Mr. Schuller, when did you prepare it? A. I prepared that——

THE COURT: Excuse me, Mr. Schuller. What do you have reference to?

MR. RODGERS: This is the exhibit about which we were talking last week.

A. That was prepared Thursday before I came.

THE COURT: Excuse me. The number of that exhibit is——

Mr. RODGERS: #74-27.

THE COURT: All right, thank you.

BY MR. RODGERS:

[627] Q. Now, over what period of time did you do the scale analysis upon which this exhibit was based? A. One night and one morning.

Q. And when was that done? A. That was done Wednesday night and Thursday afternoon.

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[653] Q. Mr. Schuller, one last question, if you had flipped a coin for each of your 162 scale samples represented by Exhibit 74-27, heads for hatchery and tails for wild, about what results would you expect to get? A. Fifty percent, I guess.

Q. Just about what you got. A. Right.

[654] Q. Did you ever have the impression that you were flipping a coin as you read these scale samples? A. I used to kid a lot about it when I was doing my thesis most of the time. It was easy to joke about it, but no, I feel the scale reading is pretty accurate. Like I say, this is about the highest percentage of any river that I've looked at that had that high a percentage of wild fish.

Q. But you did joke about it, suggesting that you felt maybe it wasn't that accurate? A. I'm sure I did.

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TESTIMONY OF MR. JAMES HECKMAN, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Direct Examination By Mr. Rodgers

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[686] MR. RODGERS: Would Your Honor object if I made a detailed offer of proof?

THE COURT: Right. No, I would not object. As a matter of fact, I was going to suggest you make a specific offer so I know exactly where you're going.

MR. RODGERS: Thank you, Your Honor. The area that I purport to cover with Mr. Heckman is a general identification of the environmental factors [687] that have been significant in affecting the rearing and survival of steelhead on the river system. We had intended to commence at the higher parts of the river system and I would propose to ask Mr. Heckman a series of questions as to whether logging activities on the Puyallup River drainage basin had adversely affected the spawning and rearing habitat of steelhead. I would propose to ask secondly an identical question with respect to other activities including flood control developments, diversions for power, gravel operations, bank revetments——

THE COURT: Excuse me, what do you mean by that?

MR. RODGERS: Essentially the——

THE COURT: Diking?

MR. RODGERS: —channeling of particularly the lower reaches of the Puyallup. The same question with respect to industrial wastes, spills of toxic substances.

I would then move specifically, and perhaps we're in an area where there is not objection, I would against that background ask Mr. Heckman whether he could assign specific losses to each of these pollution causes and incidents that we have identified on the record. The answer

would be that presently we're unable to do so in specific terms and in specific numbers, although the parameters of a study could be so designed.

Against this background I would then turn to ask [688] Mr. Heckman the specific historical questions that Your Honor will recall that I asked Mr. Millenbach, and that was whether any fix could be put on the size of the natural run in the period of the 1850's, at the time of the negotiation and signing of the Treaty of Medicine Creek. It was expected that Mr. Heckman's answer would have been the same as Mr. Millenbach's, namely, that the assignment of specific numbers is unknown and impossible.

Against that background I would then ask whether Mr. Heckman could summarize the environmental factors that we have earlier addressed that have since modified the run since those days, and I would ask him—and I will specifically state what questions I would ask him—I would ask him whether he could think of a single environmental factor affecting the spawning and rearing of salmon and steelhead on the Puyallup River drainage system that is more favorable today than it was in the 1850's. I would ask him, is it fair to say that the balance of environmental changes on the Puyallup River system has been detrimental to the steelhead population. I would further ask him whether it is fair to say that the overwhelming balance of the environmental changes on the Puyallup have been detrimental to the steelhead population.

As to both those last questions I would expect that the answer would be affirmative.

That is, essentially the area, Your Honor, that we had hoped to cover in the direct testimony.

[689] THE COURT: My position remains the same. It just appears to me that you are in an area that is so speculative, really, that it is opinion testimony at its highest level of nothing but opinion. And as far as, in

my own opinion, having any weight, really, on the issues I believe I have to decide we would spend hours in an area which I don't think would be productive of any hard evidence that I would consider really admissible. An expert can give his opinion on anything but if it is too speculative then it is not admissible.

MR. RODGERS: The basic part of his testimony, Your Honor, would be based on specific observations on the environmental conditions on the Puyallup River system; actual work that he and his staff have done beginning with the White River and continuing down the river.

THE COURT: Well, I think you can inquire as to what they have seen insofar as this might presently—I don't think, Mr. Rodgers, we can go back and correct whatever was done in 1906. Nobody knows how many steelhead were around in those days, and whether or not that particular project itself may have killed off a billion of them; we don't know. Nobody knows that and we can't guess at it. Courts are not engaged in guesswork. We're here to secure evidence which is reliable and admissible.

On the point of what they observed on the Muckelshoot Reservation, if in fact this is about spawning [690] grounds so he can testify what he saw or some staff member saw about present situations which may indicate the State is doing something to damage the natural spawning grounds, he can go into that, but on a limited basis. Because as I understand it even now he couldn't tell me in percentage terms what affect this really has on natural runs, and when he can't answer that question—and I don't mean to be impolite to anybody, I know you fellows are all working toward some common objective but in a way you haven't quite gotten there yet with specific scientific data. Now I could be entirely in error but that, at least, is my situation. I'm not blaming anybody. You've got a big problem and there hasn't been enough money around to get it solved, so nobody knows how many fish are there

and how you are going to divide them up. My attitude is, we'll take the best evidence we can and come out with some kind of conclusion.

In that limited area, Mr. Rodgers, I will allow Mr. Heckman to testify.

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[726] Q. Mr. Heckman, to your knowledge what environmental factors adversely affecting the natural run of steelhead on the Puyallup—withdrawn.

Mr. Heckman, to your knowledge what environmental factors adversely affect the natural run of steelhead on the Puyallup River system?

THE COURT: Now, you understand that all right? Not theoretical or anything, but just what you folks have observed on that river that in your opinion is going to cut down the natural propagation of steelhead.

A. Yes, I believe I understand it. I might as some back-up here note to the Court that I have——

MR. WILNER: If Your Honor please, I object to the witness giving us a lecture; I hoped he could answer the question.

[727] THE COURT: I think he is going to answer the question, Mr. Wilner. I'll overrule the objection. Go ahead.
A. (Continuing) I wanted to note that I have been chairman of the White River Fisheries Improvement Committee since aproximately 1968 and as chairman of that committee I have first-hand communication with representatives who are members of the Department of Fisheries and Game and Ecology, as well as the Corps of Engineers. We have noted in that committee that logging on the upper watersheds of most of the tributaries to the Puyallup system has been extensive and caused considerable damage in the form of excessive siltation in the streams and removal of the tree canopies along the streams causing

increased temperatures; the siltation, of course, causing direct losses to incubating eggs in the gravel because of cutting off circulation and suffocation of the eggs. We, in our staff, in our spawning ground surveys which have been continuing for salmon and steelhead now for approximately four years have noted gravel operations in the river both on the White River and the main stem Puyallup, channelization of the stream and bank revetments——

THE COURT: Where?

THE WITNESS: Bank revetments, Your Honor, a good example is the lower most portion of the Puyallup River where the river has been changed from its natural course to a straight line ditch.

THE COURT: Who did that?

[728] THE WITNESS: I'm not sure, Your Honor.

THE COURT: When was it done? I don't mean to sound sharp. It is just as if you say it, it sounds like it happened yesterday or the year before.

THE WITNESS: It looks to me like it must have happened 30, 40 years ago.

THE COURT: I'm 53 and when I was a kid that was the same river, same dike. My point is, if somebody is going to get blamed for it, I think he's long gone.

THE WITNESS: I'm sure that's true, Your Honor, except we all support the Corps of Engineers and I suspect they probably had a great deal to do with it. There is a great deal of other flood control work in the form of channelization conducted by the cooperative, Pierce and King Counties.

THE COURT: Excuse me, flood control is necessary to save these fish too, isn't it? Isn't flooding bad for fish?

THE WITNESS: Flooding can be detrimental in a natural state, however, mother nature seems to have figured out a way to take care of the fish, and in the case of steelhead in particular this is a species that largely utilizes the upper tributaries and spread out this way. They are not subject to the gross damage that would occur to a species spawning in the main stem where the bulk of the water would come down and scour the eggs out. So, one way or another she's spread them out and has protected them. The bank [729] revetment work that occurred along the Puyallup River upstream and along the White River in the neighborhood of Lake Tapps where White River takes the big curve around there, the banks have been shored up with concrete and rocks and this eliminates the water hedge of the river and destroys a good number or a good portion of the natural habitat that the young fish would use for rearing where the food production would occur.

Of course Mr. Millenbach mentioned the Puget Sound Power and Light projects on both the Puyallup River and White River that divert large portions of the water through power projects. On the main Puyallup, the Electron project, a good amount of water is diverted; I don't know exactly how many miles, but a number of miles down to the Electron power house and this reduces the quality of that river habitat. I am very much familiar with the White River situation and have presented written testimony regarding it for a Federal Power Commission hearing coming up on July 30th. We're aware that the 30 cubic feet per second——

THE COURT: Excuse me. Aren't the rest of these dams all under Federal Power licenses?

THE WITNESS: No, sir. I don't believe that either Electron or the Buckley project is under licensing and that's what this Federal Power Commission hearing is all about. The company made application for a license and

then it came under review, the Department of Fisheries and Game intervened in the application—[730] in the issuance—and then the Muckelshoot Tribe gained intervention and about that time Puget Sound Power and Light attempted to withdraw their application and all the parties intervened in the withdrawal. The problem here is, as Mr. Millenbach pointed out, the company diverts almost all of the water, particularly during the low flow period of the year through the flume to Lake Tapps and then down through Lake Tapps and Darringer and through the power house. This literally dries up about 21 miles of river and 30 cubic feet doesn't do the job. We found that you need more in the neighborhood of 200 to 500 cubic second feet to secure both fish passage and maintain the spawning and rearing habitat. There is no question but what the Corps of Engineers Mud Mountain Dam on the White River has caused numerous problems. The desilting of the reservoir at times has caused extensive siltation of the river downstream and has—we and the Fisheries Department have direct evidence of losses of downstream fish and salmon. This pretty well covers it, except I could mention the pollution problems in the lower river near the towns of Puyallup and Tacoma, industrial and domestic pollution.

BY MR. RODGERS:

Q. Are you saying, Mr. Heckman, that industrial pollution as well as the other factors you have identified have an adverse affect on the natural run of steelhead on the Puyallup. A. I would feel definitely that they do. I have examined the [731] records of the Department of Ecology which notes positively that fish kills have occurred in the area of Tacoma as a result of pollution.

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TESTIMONY OF MS. RAMONA BENNETT, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Direct Examination By Mr. Rodgers

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[755] Q. Ms. Bennett, could you please tell the Court and parties how many members of the Tribe there are? A. The United States Government for the purposes of tribal government support at this point recognize 850 members. Indian health carries 600 members as eligible for services, medical services. We're currently involved in bringing our rolls up to date. We haven't had a certified roll since 1929 and we're finding that there are considerably more than 600 Puyallups living within the reservation boundaries or service area.

Q. Now is the 850 number recognized for purposes of participating in Tribal government? A. That would be right, with some 320 voting members.

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[761] Q. Do you know whether any members of the Tribe are also sports fishermen? A. There are some sport fishermen.

Q. Now Ms. Bennett, let me ask you, currently and traditionally do your people have a way of guaranteeing escapement for spawning purposes of a steelhead run or other salmon runs? A. Yes.

Q. Could you describe to the Court how that was done? A. Well, when Mr. Millenbach was on the stand he was saying that the ideal situation would be to have a gate across the mouth of the river so fish could just literally be counted as they came through. He kind of made me smile because that's exactly what the Indian traditionally had. We had traps at the mouth of the river and we would do a harvest, but we would also be able to guarantee that fish were getting back to natural spawning areas. I think it was the State that made us take down that same gate that Mr. Millenbach recommended.

Q. Ms. Bennett, to your knowledge has the Indian fishery on the Puyallup River ever destroyed a run of steelhead or any other species? A. No.

Q. Ms. Bennett, is it the Tribe's intention to destroy such a run? A. No.

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[767] Q. Tell me what the evidence of over fishing would be that would be evident to a fisherman. A. Simply poor catches. The fishermen know that river they've been in many cases fishing on that river since they were very young boys. They know what a good run looks like and they know what it feels like in terms of catches for drift or in terms of the number of fish in a net at the end of the tide from a set. And the fishermen themselves give us the best indication of the strength of a run, and in fact have come us requesting emergency closures—a shortening of the number of days on the river or pulling their nets entirely; just saying, you know, the non-Indian commercial fishermen have already destroyed this run and [768] just back-off the river entirely.

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[773] Q. Now, Ms. Bennett, perhaps we could speak generally without particular reference to this document. With respect to the Tribe's steelhead harvest of the future what percentage of it would you estimate is likely to be taken within the boundaries of the reservation as defined by the 9th Circuit? A. Ninety percent; pretty close to all of the steelhead fishing.

Q. In some years would you estimate that the on-reservation would be a hundred percent? A. That would be very possible.

Q. Could you please explain the basis for your answer? A. Because the steelhead all go through the Puyallup Reservation.

Q. And consequently is the fishery more easily secured from points on the reservation than off the reservation? A. That would be right.

Q. You are likely to have a more productive fishery on the reservation than, for example, out in Commencement Bay? A. It's much easier to fish in the river; it's much more convenient and it's largely been where the steelhead catch has taken place.

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Direct Examination By Mr. Sennhauser

[777] Q. The Ordinance No. 200 which is dated December 8, 1971, am I to understand that this is still in effect? It is not an ordinance which has lapsed, but is a continuing regulation and ordinance? A. It's continuing.

Q. So it is in effect today still? A. Yes.

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Cross Examination By Mr. Mackie

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[780] Q. Now, the Tribe with the Tribal council, do you have any enforcement officers who are retained by the council? A. Not at this time.

[781] Q. Have you had in the last ten years enforcement officers employed or retained or deputized by the council? A. We've had fishermen authorized by ourselves to do regular reviews of fishing practices and to report violations back to the Tribal council, but we've not authorized arrests, for instance, of Indians or non-Indians that were creating problems. We have had to call the Department of Interior and other tribes for the loan of officers at different points, but that would be not for fishing.

Q. If a member of the Tribe engages in a net fishery in Commencement Bay area which is closed by this 1971 Ordinance, what enforcement action is taken by the Tribe with reference to the individual who is a member of the Tribe fishing in that closed area? A. The Tribe has at different times waived that closure or altered the boundaries that were within Tribal consent. For instance, last year some

half a dozen fishing people were authorized by the Tribal council and the fish committee, collectively, to move on out a quarter of a mile outside of the mouth of that river to do their family fishery.

Q. Your answer has been in terms of the adjustments that you made by opening an area. My question is in terms, if an individual fishes an area which is closed which the Tribe has not opened, for example in Commencement Bay, what enforcement action is taken by the Tribe with reference to that individual? [782] A. There has been no fishery that has not been recognized and approved by the Tribal council. The individual fishermen come and give us their plan, what they intend to do and if we don't approve it we tell them what we would approve and they conform to that.

Q. Do you do this in terms of amending your ordinance or is this some form of oral permission given to an individual? A. Usually just a meeting with records kept of who is going to be fishing where and what days, and what we did have to do was—because we didn't really know how the runs were going to be; we didn't know what the strength of the runs were going to be. We had them start out on a three-day week instead of a four-day week with that fishery and just kept them at three days.

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[784] Q. During the Tribal considerations of fishing regulations have you established any mechanism for Tribal members to report their fish catches to the Tribe? A. Day by day the buyers, the fish buyers make that information available to us on request.

Q. Do all of the Tribal members then sell to the same fish buyers? A. Well, there are just a limited number of fish buyers that will manage the Puyallup steelhead catches.

Q. And you have then no direct reporting requirement by individual fishermen to the Tribe as to the size of their catch. A. Well, for instance, this last——

Q. Excuse me, if you can answer the first question yes or no—— A. We don't have anything set up yet for this year but last year we did have a reporting system.

Q. A direct reporting system from the fishermen to the Tribe as to the fisherman's catch? [785] A. That would be right.

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[787] Q. That is simply the end of the season, but if it's not your recollection—now, did members of the Tribe continue after the end of the season set by the Department of Game to fish commercially by net for steelhead on the Puyallup River? A. The Tribal fishermen continued fishing under Tribal regulations on the Puyallup Reservation.

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[788] Q. Now, the Tribal policy communicated to the Department its intention to take 5,000 steelhead from the watershed for the following year, is that correct? A. Yes.

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[789] Q. With that as the premise, I'm asking, did the Tribe through any means make an advance prediction as to the total size of the anticipated winter steelhead run for the 1974-75 season? A. I think by these other exhibits you can see that we were trying to secure run size predictions or something firm, beyond estimates, from the State Game Department which would have been the only logical supplier of that kind of data. Since it was not available through that agency we will have to maintain a tight monitoring and surveillance on our fishermen and simply be prepared to back down from that figure. We can't make a prediction like that. We needed precise figures from the Game Department.

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[790] Q. Now, your letter also indicates that you have present intention to annually increase the maximum number of steelhead that you anticipate taking by 1,000 per year; is that accurate? A. Yes, that is.

Q. Have you examined the watershed and the steelhead resource to make predictions as to subsequent run sizes of steelhead on this watershed? A. We are going to be very actively involved in the restoration of watersheds and some——

Q. Excuse me, I'm not asking you about what your intentions are in the future; I'm asking in terms of whether you have at the present time studied it to determine those potential run sizes for future years to reflect your desire to increase by 1,000 per year the catch [791] that you will take of steelhead? A. No. You have to understand that the whole reason for predicting or declaring increased fisheries over a period of years is because the restoration and protection of the watershed and the river as a resource has got to be one of the logical steps in preparing the resource for that kind of fishery. See, through the——

Q. Excuse me, are you anticipating then a growth in the size of the steelhead run on the Puyallup watershed in the nature of 1,000 fish per year or some lesser or larger number? A. We see as on of our responsibilities making that a reality. That's part of our responsibility.

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Cross Examination By Mr. Tannesen

[794] Q. Initially I would like to direct your attention to what marked as Defendant's Exhibit P, and referring to what is page 4 of that exhibit under Article VIII where it indicates, "No set net shall be longer than 60 feet." In addition I would like to also refer you to the exhibit which has been entitled "Treaty Indian Gill Net Fishing Seasons for Steelhead" which were passed by the Department of Game on—anyway, which covered the period from December 1, 1973 to January 17th of '74, and that portion of the exhibit which indicates that no set net shall

exceed 150 feet in length. Would it be a fair assumption from this that the Puyallup Tribe agrees that there should be some regulation of the length of the set net? A. Oh, yes.

Q. And would it also be fair based on the fact that in paragraph—rather, Article VIII of Defendant's Exhibit #74-P, Article VIII, three, that provides, "No set net shall extend more than one-third of the distance across the river," and then referring also to the regulations issued by the Department of Game which I just referred to, paragraph II, sub paragraph 3, which provides that set nets may not extend more than one-third of the width of the stream where fished, would it also be fair to assume that the Puyallup Tribe agrees that this is a necessary regulation? A. You mean the one-third of the distance? [795] Q. Yes. A. Yes.

Q. The answer was yes? A. Uh hum.

Q. Then you would basically agree that there is a conservational necessity for regulations of this type. A. Yes.

Q. Now, you testified that on occasion a fisherman will cease fishing, an Indian fisherman of the Puyallup Tribe, if he feels there is a "poor run." A. Yes.

Q. Now, on these occasions is there any data which is taken to make this determination of the fact that there is a poor run? A. Can you please repeat your question?

Q. Yes, my question—— A. Just the part that you want answered.

Q. The question then was, do you take any sort of data to make the determination that there is a poor run which impel you or members of the Tribe to cease fishing? A. No data is really required. It costs a lot of money to run a motor and that's hard work. If the catch is light and if it's not profitable, if the fish seem to require not being fished the fishermen just let us know that and they collectively pull their nets and get off the river.

Q. Would it be fair to assume, then, that the cessation of fishing on the river is more geared to the fact that [796]

it isn't economically feasible at that point for a fisherman to expend funds in terms of gasoline and that this is the reason why the fishing would be ceased at this point? Is that correct? A. Well, just that both things are taken into consideration. The fishermen know themselves when a run is phasing out or coming in weak or in jeopardy midseason, and usually that kind of an indication then results in the Tribal government cutting out a day or closing two days of the regular fishing week so that those fishermen that prefer to stay on the river can go on ahead and be involved in a fishery harvest, but you know we listen to what our fishermen are telling us and we respond accordingly.

Q. Wouldn't it be a fair statement to say when the Tribal government decides to cut out a couple fishing days it's true then they depend on the recommendations of the fishermen? A. That would be right.

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[798] Q. Would it be fair to say that you are familiar with the net fishing practices of the Puyallup Tribe? A. Pretty much so.

Q. Could you give me some idea of what a Puyallup fisherman would consider to be an average set; that is, when he puts his net down and takes it up, what would be considered to be average in terms of number of fish while the fish are running which he could expect? A. You mean on a tide from a 60 foot net? Is that what you're asking?

Q. Yes. A. I don't know that; I don't know that there is an average.

Q. Could you give me some idea as to the upper number of fish that he might be able to catch? A. I don't know how much you understand about these fish but they move in patterns. An a real high tide on a rainy night he might have a net full of fish. The next day on the next tide there might be two or three fish.

Q. When you say a net full of fish, in terms of numbers of fish how many would this be; just a general approxima-

tion? A. Oh, I don't know. I couldn't give you weights or num [799] bers.

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Redirect Examination By Mr. Rodgers

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[804] Q. Ms. Bennett, do you conclude from this correspondence that as of this period of time neither the Tribe nor the Department of Game had information on the expected size of the run? A. I would say that's entirely true.

Q. With respect to a couple questions put by Mr. Tannesen, did I understand you—this is with respect to the length of the set net. Is it your understanding that those regulations include any purpose other than conservation? A. I think the Game Department authorized nets—what was [805] it, a hundred or hundred-fifty foot set nets?

Q. I believe the exhibit will show 150 feet. A. We set a 60 foot maximum length because that river has been dredged, and the only sets on that river are off those bridges and the bridges are pretty high up on the river. The river is fairly narrow where we're able to set. The natural eddies are gone; the river has been narrowed, and isn't a natural river any more. And at the points where we can have set nets off those bridges, you know, 150 foot would be much, much too long. It would do two things; it would go probably beyond a third of the width of the river and therefore would for conservation purposes simply not be too wise. But if you had two, 150 foot nets, one off each side, you would have no channel for drifting. So, a 60 foot maximum was necessary to accommodate the fishermen that drift that river, and additionally to allow escapement of that Puyallup River.

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Questioning By The Court

[822] Q. . . . if you anticipate you are going to catch 5,000 steelhead, what is your anticipation of the steelhead, therefore, that will be allowed to escape up the river through your regulations so they'll spawn and come back and, in effect, be a return crop the following year?

THE WITNESS: Absolutely no escapement figures necesssary are available to myself through any agency or my own knowledge; escapement to either hatchery facilities or natural spawning areas. No figure has been established and that's the blank. That's the other column that should be here, what actually escaped and what was needed to escape and what the spawning ground will actually support.

THE COURT: Then you and your people actually do not know how many steelhead this would allow to go up to spawn and then return, do you?

THE WITNESS: That's why we're making our communication with the U.S. Fish Wildlife Service.

THE COURT: But the answer to my question please is yes or no, you don't know.

THE WITNESS: There are no figures available.

THE COURT: All right, thank you.

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TESTIMONY OF MR. HENRY ADAMS, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Cross Examination By Mr. Mackie

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[919] Q. Now, I concluded from your direct testimony and correct me if I'm wrong, that if there was an extremely large run of steelhead entering the watershed and the report was that it was possible to fish for more than 5,000 without in any way harming the run or chang-

ing in a sense your pre-set percentage of the harvestable fish, that you would in fact consult with others for consideration as to increasing that 5,000 maximum, is that correct? [920] A. We would respond to recommendations and requests from particularly State agencies that it's absolutely necessary that you increase your quota, or raise your level of catch because if you don't do that, one, the sports fishermen aren't going to catch salmon and they're just going to over-populate the spawning areas, then we would undertake to crop and cultivate a greater amount of steelhead.

Q. Does your long answer translate to a yes? A. Not a definite yes to the question you asked.

THE COURT: The fact of the matter is, the council at least in your opinion and the council's opinion have the right to change that quota to suit themselves regardless of what information they get. They have the right to do that, isn't that right?

THE WITNESS: No. The right, as Ms. Bennett indicated, has ingredients of responsibilities and obligations and the right—they have the power to do it but not necessarily the right.

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[926] Q. Do you—have you taken intensive courses in fisheries or fisheries management in college? A. No. The closest I came to it was a roommate who was a fisheries major, no courses in fisheries.

Q. Do you purport to have specialized knowledge in terms of fish biology and management? A. No, I do not purport to have either of those, but I'm not totally ignorant of some things that can be learned about management.

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[927] Q. Mr. Adams, were you able during the lunch break to obtain the list of registered fishermen with the

Puyallup Tribe? A. Yes, I was able to secure a list; it isn't the formal registration list. It is not the formal registration list because that is not in the Tribal records for the probable reason that the Tribal official who was registering did leave the State earlier this year and apparently did not leave any formal registration list.

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Cross Examination By Mr. Willner

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[930] Q. All right. Now I notice on Earl Youell and Warren Bliner the notation that they are not Puyallup but married to Puyallup. Does that mean if they are [931] married to Puyallups they have Indian Treaty fishing rights? A. Indian persons married to Puyallups living with and supporting the family, whether it be just a wife or be wife and children, have been accepted into Puyallup Tribal relations and to exercise an acquired right to take fish with authorization from the Puyallup Tribe.

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[934] Q. Benny Reed Jr., I notice, is the first name added in ink. There's a series of names in typewriting and then some names in ink. When were the names in ink added to that list? A. The names in ink were added to this list today at my request. I previously had the typewritten list.

Q. When was the typewritten list made up? A. It was made up, if I recall correctly, in late April—possibly the first week in May at the latest.

Q. And the typewritten list headed "Puyallup Fishermen," is that correct? A. That's correct.

Q. All right. Now the names starting with Benny Reed Jr. and the rest of the names in ink, were they all added to the list this noon hour? A. Yes, it was a correlation of, I think, at least two and no more than three lists which had been prepared at my request earlier attempting to

identify and secure full information on who would be fishing in the coming season.

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[939] A. Well, I would assume on the basis of previous experience with the Tribe that somewhere between 300 and 400 of the membership live within a 20-mile radius from [940] the former Cushman Hospital and that several hundred others live beyond that, ranging to Seattle and then scattered around other places in the United States.

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TESTIMONY OF MR. JAMES HECKMAN, CALLED AS A WITNESS BY THE PUYALLUP TRIBE

Cross Examination By Mr. Mackie

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[1005] Q. Do you believe that the planting of steelhead by the Department of Game in rivers which border on or go across reservations areas benefit the Indian catch in those areas? A. Yes.

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[1015] Q. No, I believe it has reference to the distribution of the steelhead once they are commercially caught by Indians in the watershed.

THE COURT: Apparently he didn't mean they were swimming up the river underground; it was after they were sold that they were surreptitiously disposed of, I suppose. Is that correct, Mr. Mackie?

MR. MACKIE: I believe that's what the reference was to.

A. I see, if that's what I said I probably was referring to the fact that all of the steelhead that are caught by the Indians are not sold directly to licensed buyers and do not become a matter of record.

BY MR. MACKIE:

Q. Some of those are sent directly out of State? A. I understand that some are, yes.

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[1029] Q. Do you recall in 1971, after conferring with the Department of Fisheries with regards to the 1971 Chinook run on the Puyallup, recommending to the Puyallup Tribe that they reduce their fishing days on that particular fishery? A. Yes. I have been in consultation with the Fisheries Department and conveyed to the Puyallup Tribe, both the fish committee and the council, the information that the Department of Fisheries expected a very low [1030] run of fall Chinook salmon.

Q. Did you pass on to them at the same time recommendations for some curtailment of their fishing activities on that Chinook run because it was anticipated it would be very low? A. Yes, I did.

Q. Did the Puyallup Tribe make those reductions? A. Yes, they made a reduction in their weekly fishing time, from five to four days.

THE COURT: Did you recommend a specific closure?

THE WITNESS: Yes, Your Honor, I did recommend that they reduce it to three, and I had conferred closely with both the director and the assistant director of the Department prior to that, and they felt this would be a reasonable reduction in the fishery.

BY MR. MACKIE:

Q. Was the reduction—did the reduction made by the Tribe coincide with the reduction that you suggested? A. No. I suggested a reduction of two days and they finally——

THE COURT: Two or three? I think you said three before.

THE WITNESS: They were fishing five days a week. I recommended that they fish three days and they concluded by modifying their regulations to allow a four-day week fishery.

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[1034] Q. Now, you still in terms of 1973 have not answered whether the Indians on the Puyallup accepted your recommendation for the reduction on the 1973 Chinook fishery. A. I spoke to Ms. Bennett and to the chairman of the Puyallup Tribe and I relayed to them the information that had been provided to me by Fisheries and they chose not to reduce their fishing time, as I recall it.

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[1048] Q. Now, are you aware of the average size of steelhead which are harvested in the Puyallup water basin? A. I am generally familiar with the average size of steelhead but, no, I have not sampled the landings in that system to be able to come up with an average size, no.

Q. Would it be a general approximation for size in your best estimate in the range of eight to ten pounds per steelhead in that system? A. In the net fishery?

Q. Yes. A. Yes, I think that would be close.

Q. Are you aware of the commercial price for steelhead in Western Washington through the fish buyers over the course of the last fishing season per pound? A. Yes, I am. I didn't conduct a survey of buyers to determine what it was, but I incidentally heard what some were paying.

Q. Could you tell us approximately what those price ranges were per pound? A. I recall prices in early January of a dollar to a dollar twenty per pound. This is fish to the buyer, or pardon me, to the fisherman for fish in the round, the entire fish before it's been dressed.

Q. So on this then the average for a steelhead would have been somewhere around $10 in terms of its [1049] commercial price? A. If we're talking of ranges and you indicated eight to ten pounds, it would be eight to ten dollars.

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EXHIBIT 74-2

Puyallup River System Steelhead Plants and Catch

Winter Season	Cycle Plant [1]	Indian [2]	Sports	Total
1947-48			1,937	1,937
49			4,644	4,644
50	52,000		7,443	7,443
51	18,000		6,037	6,037
52	33,000		15,660	15,660
53	66,000	104	15,566	15,670
54	74,000	2,671	19,296	21,967
56	47,000	2,308	20,348	22,656
56	47,000	2,308	20,348	22,636
57	70,000	2,554	14,184	16,738
58	57,000	2,960	8,794	11,754
59	58,000	2,740	7,528	10,268
60	55,000	4,506	9,547	13,053
61	63,000	2,917	4,684	7,601
62	79,000	2,629	10,419	13,048
63	57,000	1,834	11,717	13,551
64	65,000		15,942	15,942
65	63,000		6,914	6,914
66	93,000		18,761	18,761
67	65,000		15,971	15,971
68	100,000		16,971	16,971
69	67,000		11,602	11,602
70	98,000	500	6,738	7,238
71	124,000	1,500	12,101	13,601
72	123,000		9,648	9,648
73	122,000	1,105	4,015	5,120
74	107,000			
75	75,000			
76	68,000			

[1] Cycle plants made 2 years prior to winter season, i.e., cycle plant of 52,000 (1950) was made in 1948 and contributed to the catch of 7,443 fish in 1949-50 winter season.

[2] Data represents White River and Puyallup Indian catch as available and is incomplete.

EXHIBIT 74-29

Puyallup Fishermen

Frank Wright Sr.		*Ray Turnipseed N-II* *married to Bertha Turnipseed, Puy*
Frank Wright Jr.		
Arnold Williams Jr.		
Arnold Williams Sr.		
Harry Dillon		*Mike Turnipseed*
Herman Dillon Sr.		*Mac Turnipseed*
Frederick Dillon		*David Turnipseed*
Don George Jr.		*Katherine Turnipseed*
Richard George		*Bobby Thomas*
Ben Wright Jr.		*Melvin Iyall*
Ben Wright Sr.		*Charlie Cantrell*
Earl Youell *N-I*	*not Puyallup but married to Puyallup*	*Wayne Cantrell*
		Jimmy Siddle
Warren Bliner *Skokomish*		*Jimmy Siddle Jr*
		Robert Satiacum
Harold Farris		*Robert Satiacum Jr*
Vernon Cross		*Charles Satiacum*
Tom Dillon		*Chester Satiacum*
Larry George		*Dolores Satiacum*
Jerry George		*Shirley Satiacum*
[Leo Daniels]	*Muckleshoot married to Puyallup*	*Danny Satiacum*
		Karen Satiacum
[Roger Jackson]	*Quileute married to Puyallup*	*Jack Starr Moses*
		Joe Earl married to Puyallup
Rev. Jack Moses		*Linda Earl*
Joe Moses		*Dorothy Earl*
Charlene Williams		*Joe Earl Jr*
[Tom Cummings]	*Oklahoma Indian married to Andrea George, Puy*	
Joan Dillon		
[Joe Peterson]	*Nez Perce married to Card George, Puy*	
Silas Cross Sr.		
Silas Cross Jr.		
Benny Reed Jr.		

Note: Italics indicate handwritten words on original.